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Filed Oct. 14, 1898.

Supreme Court of the United States.

OCTOBER TERM 1898.

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MARTIN F. MORRIS ET AL.

vs.

THE UNITED STATES.

BRIEF FOR APPELLANT, W. W. RAPLEY.

ENOCH TOTTEN,
EDWARD A. NEWMAN,
Counsel for W. W. Rapley.

LAW REPORTER PRINT.

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The case of this appellant, in its facts and the principles of law, applicable thereto, does not differ materially from the cases of the appellants, American Ice Company and others, and with the consent of Messrs. Carlisle, Johnson and Lambert, counsel for the appellants, adopts the brief filed by those counsel and submit the case of this appellant upon that brief.

ENOCH TOTTEN,
EDWARD A. NEWMAN,
Counsel for W. W. Rapley.

IN THE

Supreme Court of the U. S.

OCTOBER TERM, 1898.

No. 49.

M. F. MORRIS, ET AL.,

vs.

THE UNITED STATES.

APPEAL FROM THE SUPREME COURT OF THE DISTRICT OF COLUMBIA.

BRIEF FOR THE CHESAPEAKE AND OHIO CANAL COMPANY, AND JOSEPH BRYAN, JOHN K. COWEN AND HUGH L. BOND, JR., TRUSTEES, APPELLANTS.

STATEMENT.

From the year 1832, down to the time when the Potomac flats were raised above tide by filling in, the actual *ripa* of the river from Twenty-sixth street eastward to the Tyber Basin at Seventeenth street (except opposite square 148 and part of square 129)

was the towpath bank of the Chesapeake and Ohio Canal. This physical fact is not disputed; and the Court below state it even more broadly than the proof warrants (Record, p. 2531). We print in Appendix A extracts from the testimony in the Record, principally of witness for the United States, showing the condition of things along this river front.

The United States have proved, admit and insist on the fact that the towpath bank of the canal was the actual *ripa*. The United States also claim as against the Kidwell claimants and admit toward these appellants, that the land in dispute, between Twenty-sixth street extended and Seventeenth street extended, was an accretion to the upland or shore of the river. Consequently, between the United States and these Appellants, there is no question of fact; but the questions between them are as to the legal rights arising from the undisputed facts, viz: (1) Were riparian rights appurtenant to the upland along this part of the river shore under the division of the upland between the proprietors and the United States? and (2) Did the Canal Company hold such rights appurtenant to its lands lying on the water's edge?

At the time the Canal Company took possession, the upland or river bank belonged in part to individual owners, and in part to the United States. The Canal Company claims (1) that it acquired the *ripa* belonging to the individual owners, and with that *ripa* the riparian rights appurtenant thereto, and (2) that it acquired the *ripa* belonging to the United States, and with that *ripa* the riparian rights appurtenant thereto. These two claims being distinct and referable to separate claims of title, we shall discuss them separately, taking first the title from the individual riparian owners, which relates only to squares 63, 89, 129, and south 22.

ASSIGNMENT OF ERRORS.

1. That the Court below erred in holding that the Chesapeake and Ohio Canal Company was not the owner in fee simple of the *ripa* of the Potomac River between 26th Street and 17th Street.

2. That the Court below erred in holding that the said lands of the Chesapeake and Ohio Canal Company had not as appurtenant thereto riparian rights.

3. That the Court below erred in holding that the riparian rights of said lands were cut off by an alleged street.

4. That the Court below erred in holding that the Chesapeake and Ohio Canal Company and those claiming under it was and were not the owners in fee simple of so much of the lands mentioned in the Bill of Complaint as joined the said lands of the Chesapeake and Ohio Canal Company between 26th Street and 17th Street, and lie between the Canal and the Channel of the Potomac River.

5. That the Court below erred in divers other particulars apparent upon the record.

ARGUMENT.

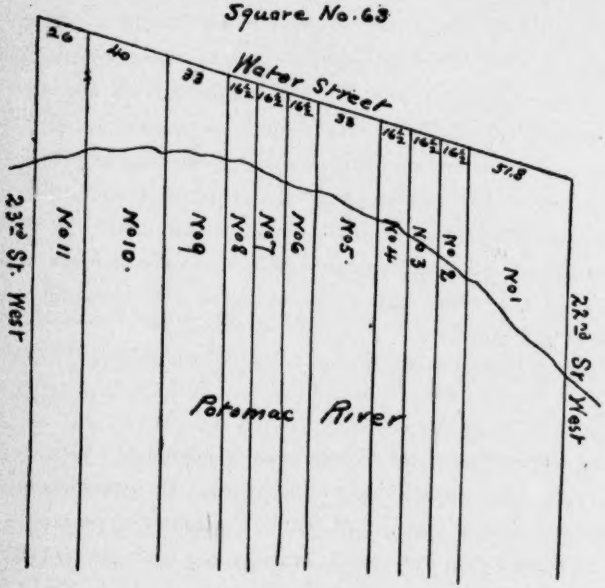
I.

A.—Title of Individual Riparian Owners.

1. *Squares 63 and 89.*

The certificates of the laying out and division of squares 63 and 89, recorded by the commissioners, as provided by law, are as follows (Record, pp. 793 and 700–701):

"At the request of the commissioners appointed under the Act of Congress for establishing the temporary and permanent seat of the Government of the United States the following square in the city of Washington was recorded the 3rd day of January, 1800:



"Bounded on— The north by Water street, two hundred and eighty-two feet eight inches,
The east by 22nd street west,
The west by 23rd street west,
The south by Potomac River.

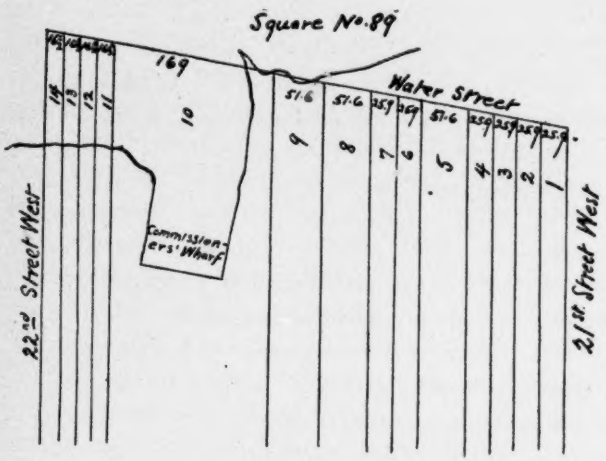
"As per return dated June 17th, 1793.
"August 22nd, 1796.
"James B. Dermott.

"Thomas Johnson, David Stewart, and Daniel Carroll, Commissioners, set out and assigned in this square numbered sixty-three, in the city of Washington, the lot numbered two for lot numbered thirteen, in Hamburgh; lot numbered three for lot numbered four, in Hamburgh; lot numbered four for lot numbered fourteen, in Hamburgh; lot numbered five for lots numbered eight and ten, in Hamburgh; lot numbered six for lot numbered eleven, in Hamburgh; lot numbered seven for lot numbered seven, in Hamburgh; lot numbered eight for lot numbered six, in Hamburgh; lot numbered nine for lots numbered two and five, in Hamburgh; lot numbered eleven for lot numbered one, in Hamburgh, as a compensation for the claims of the original proprietors and owners of the said lots formerly set out in Hamburgh; and lots numbered one and ten are to remain to the public; as appears by the original plans and proceedings in the Commissioners' Office.

"Dated the twenty-sixth day of June, one thousand seven hundred and ninety-four.

"August 20th, 1799. "R. KING,
"*Surveyor.*"

"At the request of the Commissioners appointed under the Act of Congress for establishing the temporary and permanent seat of the Government of the United States, the following square in the city of Washington was recorded the 3rd day of January, 1800:



"Bounded on— The northeast by Water street 544 feet,
The east by 21st street west,
The west by 22nd street west,
The south by Potomak River.

"As per return dated June 17th, 1793.

"And'w Ellicott,
"Augt. 9, 1799.
"R. King."

"Thomas Johnson, David Stuart and Daniel Carroll, Comissioners, set out and assigned in this square numbered eighty-nine, in the city of Washington, the lot numbered 1 for lot numbered 165, in Hamburgh; lot numbered 3 for lot numbered 163, in Hamburgh; lot numbered 4 for lot numbered 164, in Hamburgh; lot numbered 5 for lot numbered 159, in Hamburgh; lot numbered 6 for lot numbered 162, in Hamburgh; lot number 7 for lot number 161, in Hamburg; lot number 11 for lot number 17, in Hamburgh; lot number 12 for number 15, in Hamburgh; lot

number 13 for lot number 18, in Hamburgh; lot number 14 for lot number 19, in Hamburgh, as a compensation for the claims of the original proprietors and owners of the said lots, formerly set out in Hamburgh; and the lots numbered 2, 8, 9 & 10 remain to the public.

"August the 28th, 1799. "R. KING,

"*Surveyor.*"

For the legal effect of the foregoing certificates, and the rights thereby vested in the individual lot owners, we need cite only the decision of this Court in Potomac Steamboat Co. vs. Upper Potomac Steamboat Co., 109 U. S., 672.

Speaking of the commissioners' certificates for squares 472 and 504, this Court said: "It was also decided in that case" (Van Ness vs. Mayor, &c., of Washington, 4 Pet., 232), "that the legal effect of the final instrument which defined and declared the intentions and rights of the parties could not be modified or controlled by proof of any preliminary negotiations or agreement. 'The general rule of law is,' said the Court, 'that all preliminary negotiations and agreements are to be deemed merged in the final settled instruments, executed by the parties, unless a clear mistake be established.' This applies not only to the formal deeds from Notley Young to Beall and Gantt, and from them to the commissioners, but also to the certificates and plats made and recorded by the latter, which, under the Maryland Act of December 28, 1793, Burch. Dig., 224, 'shall be sufficient and effectual to vest the legal estate in the purchasers, their heirs and assigns, according to the import of such certificates, without any deed or formal conveyance.' It is under and according to these certificates, granted to Notley Young and Greenleaf, that the plaintiffs derive their title; and parol evidence to contradict, vary or explain them, is no more to be admitted than if they were formal conveyances." (109 U. S., 681.)

In the case of the Steamboat Companies above cited, the plaintiffs sought to contradict, vary or explain the certificates and plats as against the title vested in the United States under the certificates. In the present case, the United States seek to contradict, vary or explain the certificates and plats for squares 63 and 89, as against the title thereby vested in the other parties to the division of those squares. The parol evidence which the United States seek to introduce in the present case, is the same in character as that which this Court held inadmissable in the case cited.

In the earlier case, too, this Court had before it substantially all the evidence, outside of the commissioners' certificates and plats, which is contained in the present record. Summarizing the effect of that evidence the Court said:

"That there was on the original plan of the city and in the division made between the original proprietors and the United States, a classification of the squares and lots into 'water lots,' with riparian privileges, and the rest which were not, admits of no dispute. The exact nature of the difference is well pointed out in a very elaborate report made May 25, 1846, to the common council of the city, by a committee appointed to investigate the subject, and their conclusions on the point seem to us supported by the records and documents of the time. They say: 'Squares in the water with water lots were laid off by the commissioners and divided with the proprietors on the navigable waters of the eastern branch, Potomac and Rock Creek. Water lots were defined by metes and bounds on three sides, and were estimated originally in the division, since in sales, and now for assessment by the front foot.' * * * 'On the plan of the city all the streets are delineated and all the property laid off. Every owner of a lot in the city can tell by the description of it in his deed what are its bounds on all sides; if it has a water boundary, the deed says so, and he has a right to wharf out into the river; if it is bounded on

all sides by the land he has no such right, the right to wharf belonging only to land bounded by the water.' If there are any individual cases that are exceptions to these statements, nevertheless their general accuracy we consider well established, and that they manifest the original intention of the parties to the transaction. Disputes undoubtedly arose, some quite early, not so much as to what rights belonged to water lots, nor as to what properly constituted a water lot, but in regard to particular localities, whether that character attached to individual squares and lots. In part, at least, the uncertainty arose from the fact that the plan of the city, as exhibited on paper, did not accurately correspond at all points with the lines as surveyed and marked on the land. Complaints of that description and of designed departures from the plan, seem to have been made. It is also true, we think, that mistakes arose, as perhaps in the very case of the lots on the north side of Water Street, owing to the fact that the street existed only on paper, and for a long time remained an unexecuted project, property appearing to be riparian, because lying on the water's edge, which when the street was actually made, had lost its river front. They were thought to be water lots, because appearing to be so in fact; but were not so in law, because they were bounded by the street and not by the river." (109 U. S., 692–3.)

The lots in squares 63 and 89 were water lots both in fact and in law, under the above definition.

Strangely enough, the counsel for the United States seek to sustain by the same decision their contention that the lots in squares 63 and 89 were not water lots with riparian rights appurtenant.

Their argument may be stated thus:

(1) Because a street, to wit: Water street, existing not in fact but only on paper, lay south of squares 472 and 504 and between them and the river, the Court held that those squares had no riparian rights appurtenant.

(2) We find on the early plans of the city indications of a street, south of squares 63 and 89 as there shown, and between them and the river.

(3) There being a street on paper in each case, the riparian rights must be the same in each case.

This argument ignores the true ground of the decision in the Steamboat Companies' case. Throughout the opinion in that case, the Court rests its decision on the legal effect of the commissioners' certificates and plats. Those certificates and plats laid out and called for Water street as the southern boundary of squares 472 and 504, and thereby vested in the United States a strip of land along the water front between the squares mentioned and the river. The Court did hold that the title so vested in the United States was not affected by the delay in actually grading and opening the street. The Court nowhere holds that the mere indication of a street on one or more of the early plans of the city can be proved to contradict, vary or explain the certificates of location and division made by the commissioners upon actual survey of the land for the purpose. On the contrary, the Court adopts as its own the statement of the council committee that "every owner of a lot in the city can tell by the description of it in his deed what are its bounds on all sides; if it has a water boundary, the deed says so, and he has a right to wharf out into the river." The concluding paragraph of the opinion summarizes the grounds of the decision thus: "Enough has been said to show that the rights of the parties respectively stand upon the legal effect of the original documents of title. According to them, as we have shown and now decide, the riparian rights claimed by the appellants, which originally were appurtenant to the land of Notley Young, by virtue of its adjoining the Potomac river, passed to the United States by the conveyance which vested in them the owner-

ship of the land on which Water street was laid out and has been built." (109 U. S., 698.)

The parol evidence by which the United States seek to modify or control the legal effect of the original documents of title for squares 63 and 89 consists in the L'Enfant plan of 1791 (admittedly only a sketch and never adopted), the Ellicott or Engraved map of 1792, and the Dermott map ordered in 1795 and approved by President Washington, March 2, 1797, and by President Adams July 23, 1798, (Exhibit M. F. M. No. 13, Record Appendix Part 1, page 118.)

The certificates for squares 63 and 89 were both recorded January 3, 1800. By them it appears that as to square 63 the return of survey was dated June 17, 1793, and certified by James R. Dermott, August 22, 1796, and the division by the commissioners dated June 26, 1794, certified by R. King, surveyor, August 20, 1799; as to square 89, the return of survey was dated June 17, 1793, by Andrew Ellicott, certified August 9, 1799, by R. King, and division certified August 28, 1799, by R. King, surveyor.

A comparison of these dates with the respective dates of the maps on which counsel for the United States rely, shows that notwithstanding the existence of the L'Enfant plan and the Ellicott or Engraved map, the squares 63 and 89 were laid out, surveyed and returned bounded on the south by the Potomac River, and the lots set out and assigned by the commissioners in accordance with such locations and surveys; and that notwithstanding the existence of the Dermott map, as well as the two earlier maps above mentioned, the commissioners caused the plats and certificates of division for these squares to be recorded as required by law, so as to take effect as conveyances, all with the approval and upon the certification of the engineers then in charge of the survey and laying out of the city, these engineers being the very men who made the maps on which counsel for the United States rely.

If the parol evidence offered on behalf of the United States could be admitted at all to control or modify the legal effect of the commissioners' certificates and plats, it would be admissible only to show an understanding and intention of the parties to the division, by which the lots in squares 63 and 89 were not to have the riparian rights of water lots including wharfage rights and the right to maintain the adjacency of the lot to the water, but were in fact to terminate at and be bounded on the south by a street, whenever the United States might see fit to construct such a street. Not only would the evidence offered by the United States, if admissible and admitted, be insufficient to establish such a controlling intention of the parties to the division, but the record here furnishes positive evidence to disprove such an intention. It appears by the commissioners' certificates themselves that the lots laid out in squares 63 and 89 were set out and assigned to the original proprietors and owners of certain lots in Hamburgh, as a compensation for the claims of the original proprietors and owners of the lots formerly set out in Hamburgh; and by reference to the map of Hamburgh (opposite page 399 of Record, Appendix Part 2), it further appears that the said lots formerly set out in Hamburgh were water lots. The considerations, therefore, which a minority of the court in the Steamboat Companies' case, thought sufficient to control the construction of the commissioners' certificates in question there, would certainly be strong enough to rebut any presumption from the maps relied on by the United States, that the original proprietors agreed to exchange their water lots for lots without riparian rights, or that the commissioners intended to make such an inequitable division. Moreover, under the evidence in the record the fact that the general map or plan of the city, as gradually developed, showed a proposed street in the water of the Potomac River, can give rise to no presumption that the commissioners, or those to whom lots were assigned or sold, under-

stood or intended that a square or lot bounded by the Potomac River should terminate at or be bounded by such a street when constructed. The regulation adopted by the commissioners July 20, 1795, quoted on pages 675 and 676 of 109 United States, provides specially for such a case; and the King map of 1803, (Record, Appendix Part 1, opposite page 76) shows the application of that regulation in the case of these very squares 63 and 89.

In the light of the other evidence in the Record, therefore, the parol evidence of maps, whether contemporaneous or subsequent, offered by the United States, fails utterly to prove any understanding or intention which could control or modify the legal effect of the commissioners' certificates and plats for squares 63 and 89, even if such parol evidence were admissible at all.

There was no agreement that the United States should hold all the riparian rights. There was no agreement that where a street was shown on the plan no riparian rights should extend beyond it. There was no agreement on the subject beyond the deed of trust, which provided that the Trustees should divide the lands conveyed, laying them off in lots so far as they should think necessary for the Federal City, and that when laid off the streets should go to the United States and the lots be divided between the United States and the proprietors, half to be sold, half to go to the proprietors in consideration of their original lots. That was the agreement.

Now, take the case of the lands included in Hamburg. The commissioners in laying down the new plan come to B street. At this point there is no land beyond B street except a fringe. They call B street "Water street," because it is the nearest street to the water. There is no room to lay down A street, as shown on the Engraved plan. The commissioners had no authority beyond the land conveyed to them, and the land conveyed to them did not, under any of the patents, extend beyond low water mark;

therefore they had no authority to plat and divide anything beyond that. They never assumed any authority to divide beyond the tide line, because they did not have the land. Their authority was derived from deeds of trust from individuals, and it was authority to divide land conveyed to them, and they had no authority to lay out streets in the Potomac river. They come to this shore; they lay out blocks 62, 88, 128, 147. This is easy enough because it is dry land. They lay down Water street, or B street; there is enough dry land to do that. There is not enough dry land to make another block and lay down A street. Now what, under their deeds of trust, are they to do? They are bound to divide the land, divide it equally, and to divide it with all the rights that belong to it. There was no authority or agreement by which the riparian rights that attached to this land when conveyed by the owners to the trustees could be destroyed by the latter. The only thing the trustees could do was to reconvey the lands with all their appurtenant rights. Mr. Justice Miller, speaking also for Chief-Justice Waite and Mr. Justice Gray, dissenting in the case of the Steamboat Companies, says (109 U. S., 699):

"The riparian rights of land owners on the Potomac river were understood at that time as well or perhaps better than they are now, and the value attached then, and especially to the right to construct wharves, is shown clearly by the record and by the act of the legislature of Maryland of December 19th, 1791, cited in the beginning of the Court's opinion. It therefore could not have escaped attention, if the entire water-way of the river, and the right of approach to it and use of it in regard to wharves and landing places, was vested exclusively in the United States, that no equal division was made of this important right, unless it was by the right attaching to each lot which, but for Water street, would be bounded by the river."

The minority say, that the right of these trustees to deprive this land which was conveyed to them for division, of any of its rights, before it was divided, did not exist, and that therefore it must be presumed, as they were to make an equal division, that they divided it so that when a man got back his lot he got it back with the same riparian rights appurtenant as when he conveyed it to the trustees.

That was the view adopted by the minority of the court, and the majority could answer it only in this way:

"It is urged that the construction of the rights of the parties which deprives the claimants under Notley Young and Greenleaf of the rights of wharfage opposite their property on the north side of Water street, in effect gives to the United States the entire water front on the Potomac river, without an equivalent, and thus violates that equality in the division which was expressly stipulated for in Notley Young's deed to Beall and Gantt.

"But there is no dispute as to the division that was actually made, and each party received, so far as the conveyances are concerned, precisely what he agreed to take and was satisfied with. The supposed inequality arises from a construction of law upon the transaction, as it is admitted or proved to have taken place, and its legal effect is not dependent upon its actual results. The division, which it was agreed should be fair and equal, was of the lots into which the lands should be laid off; the grantor was to receive back any lands not so laid off, and the streets were to be the property of the United States, and, of course, with whatever appurtenant rights belonged to them as streets, or to the land over which they were laid out." (109 U. S., 687.)

In short, the only answer which the majority could make to the equity insisted on by the minority, was that such was the letter of the bond.

Here comes the United States in this case, and asks to alter the letter of the bond, to alter the deed, in order to work the very

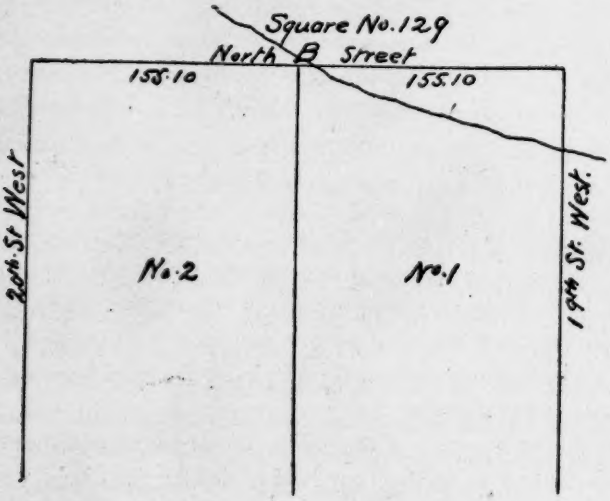
injustice and inequality which all the judges admitted in that case. There is not a shadow of authority in 109 U. S. for the right of the United States, though they show forty streets, to limit the riparian rights which passed to the lot owners by virtue of their certificates of division from the commissioners.

The riparian rights appurtenant to a water-lot on the Potomac River in the District of Columbia are sufficiently defined in the Steamboat Companies' case, 109 U. S., 672, and in Shively vs. Bowlby, 152 U. S., 1.

2. *Square 129.*

The certificate of the laying out and division of square 129 is as follows (Record, pp. 787–8):

"At the request of the commissioners, appointed under the Act of Congress for establishing the temporary and permanent seat of the Government of the United States, the following square, in the city of Washington, was recorded the 13th day of April, 1797.



The north by B street, north three hundred and eleven feet eight inches.

"Bounded on— The east by 19th street west,
The west by 20th street west,
The south by Potomack River.

"The Commissioners and David Burnes, original proprietor of this square, numbered one hundred and twenty-nine, in the city of Washington, have agreed that lot numbered one shall remain to the said David Burnes, and lot numbered two is subject to be sold agreeably to the deeds of trust concerning lands in the said city.

"Witness our hands this twenty-sixth day of December, in the year one thousand seven hundred and ninety-six.

"Witness:
"Jno. Nicholson,
"T. Munroe.

"Gust's Scott,
"William Thornton,
"Commiss'rs.
"D'd Burnes."

What we have said as to the legal effect of the certificates for squares 63 and 89 applies as well to that for square 129.

B.—Canal Company's Estate in Lands Acquired for its Works.

By the 4th section of the charter of the company the president and directors were authorized to agree with any person or persons, on behalf of the said company, to cut canals, erect dams, open feeders, construct locks, and perform such other works as they shall judge necessary or expedient for completing the canal hereinbefore mentioned and described.

By the 15th section of the charter the president and directors are authorized to purchase any land needed for canal locks, dams,

ponds, feeders and other works, or, in case they cannot purchase, to condemn land in the manner provided by that section. After providing the mode of condemnation, the section further provides that on payment of the jury's valuation "the said company shall be *seized of such land as of an absolute estate in perpetuity*, or with such less quantity and duration of interest or estate in the same, or subject to such partial or temporary appropriation, use, or occupation, as shall be required or described," (in the inquisition,) "*as if conveyed by the owner to them.*"

By the 13th section the Potomac Company is authorized to surrender its charter and convey in due form of law to the Chesapeake and Ohio Canal Company, all the property, rights and privileges owned, possessed and enjoyed by the Potomac Company; and the Chesapeake and Ohio Canal Company is thereupon authorized to accept such surrender and transfer, and to hold, possess, use and occupy all the said property, rights and privileges in the same manner and to the same effect as the said Potomac Company now hold, possess and occupy the same by law. Pursuant to this authority the Potomac Company did convey all its property to the Chesapeake and Ohio Canal Company.

The 11th section of the Potomac Company's charter (Virginia Act of October, 1784), provides that upon the valuation by the condemnation jury and payment by the company "the said company shall be seized in fee of such land as if conveyed by the owner to them and their successors by legal conveyance." So that the 13th section of the charter of the Chesapeake and Ohio Canal Company contemplated the acquisition by the Canal Company of the fee simple land of the Potomac Company.

The 9th section of the charter provides "that for and in consideration of the expenses the said stockholders will be at, not only in cutting the said canal and erecting locks and dams, providing aqueducts, feeders and other works, and in improving and

keeping the same in repair, the said canal and all other works aforesaid, or required to improve the navigation thereof, at any time hereafter, with all their profits, subject to the limitations herein provided and to none other, shall be and the same are hereby vested in the 'said stockholders, their heirs and assigns forever as tenants in common in proportion to their respective shares, and be forever exempt from the payment of any tax, inquisition or assessment whatsoever.'" The 17th section provides for the transfer of the stockholders' interest by deed.

In Van Ness vs. The Mayor, &c., of Washington, 4 Peters, 232, this Court, speaking through Mr. Justice Story, said:

"The streets and public squares are declared to be conveyed 'for the use of the United States forever.' These are the very words which by law are required to vest an absolute unconditional fee simple in the United States. They are the appropriate terms of art, if we may say so, to express an unlimited use in the government. If the government were to purchase a lot of land for any general purpose, they are the very words which the conveyance would adopt, in order to grant an unlimited fee to the use of the government."

Mutatis mutandis, the same statement can be made of the language of the Chesapeake and Ohio Canal Company's charter, which provides that "the said company shall be seized of such land as of an absolute estate in perpetuity as if conveyed by the owner to them," and the provision of the 9th section which says that the canal and other works "shall be and the same are hereby vested in the said stockholders, their heirs and assigns forever as tenants in common."

That the Chesapeake and Ohio Canal Company acquired an absolute estate in fee simple in the land purchased or taken by it for its canal and works, is further shown by reference to the sub-

sequent Acts of the Legislatures of Maryland and Virginia and the Congress of the United States.

By the Act of Virginia, passed February 27, 1829, and ratified by Congress March 3, 1837, it is provided, "that whenever it may be necessary to form heavy embankments, piers or moles at the mouths of creeks or along the river shore, for basins and other purposes, and the president and directors may deem it expedient to give a greater strength to the same by widening them and constructing them of the most solid materials, the ground so formed for such useful purpose may by them when so made, *be sold out* or let for terms of years as they may deem most expedient for the company, on such terms as may direct the application of the proceeds thereof to useful purposes and at the same time repay the necessary expense of the formation of such embankments, piers or moles, provided this power shall in no case be exercised so as to injure the navigation of the canal."

The joint resolution of the Legislature of Maryland, passed February 27, 1843, recites that "Whereas it appears to this General Assembly by the annual report of the Chesapeake and Ohio Canal Company, bearing date December 2, 1842, that there are various small parcels of land, remnants of pieces, *condemned* or purchased for the use and benefit of the said canal company, situated along the line of said canal, which are not and never can be required for the use of said canal or its works, and which are covered by certain mortgages executed by said company to the State of Maryland," and then authorizes the sale of such land by the company free from the State's mortgages, and the conveyance of the same to the purchasers.

The resolution then further ratifies the sales made by the company, of certain lots and warehouses in the District of Columbia, on the sixth day of August, 1842. Among the lots, the sale of which by the canal company was so ratified by the Maryland

Legislature, were lots 84, 85 and 86, in the Beall and Deakins Addition to Georgetown, which had been condemned by the canal company, by inquisition taken December 10, 1829, recorded April 8, 1830, in Liber W. B. No. 33, folios 127, &c., of the land records of the county of Washington.

These acts of Maryland, Virginia and the Congress of the United States constitute a complete legislative interpretation of the charter of the canal company as vesting in that company an absolute estate in fee simple in the land purchased or taken for its canal and works.

The Pennsylvania Act, entitled an Act to provide for the commencement of a canal to be constructed at the expense of the State, and to be styled "The Pennsylvania Canal," passed February 25, 1826, Pamphlet Laws, 55, contained a provision for the condemnation of land in exactly the same language as that contained in the charter of the Chesapeake and Ohio Canal Company. (The C. and O. Canal Co's enabling act in Pennsylvania was passed February 9, 1826.) The provision of the Pennsylvania Canal Act was construed by the Supreme Court of Pennsylvania, first, in the case of Commonwealth against McCallister, 2 Watts, 190, decided in 1834, and again in Haldeman vs. The Pennsylvania R. R. Co., 50 Pa. St., 425. In each case it was held that condemnation under the Act vested an absolute fee simple estate in the Commonwealth.

In the case last cited, the Court say:

"It is very evident from the Act of Assembly of February 26th, 1826, entitled 'An Act to provide for the commencement of a canal to be styled The Pennsylvania Canal,' that the purpose of the Legislature was to secure the acquisition, in absolute ownership, of the lands through which the canal was intended to pass, so far as those lands were designed to be actually and permanently occupied by the canal. Two kinds of occupation were plainly in view; one permanent and continuing, and the other

temporary or of limited duration, such as might be required for the deposit of materials or accommodation of the workmen while the canal was in process of constrution. Hence, the viewers were required to value the land and all damages the owner or owners should sustain by reason of cutting the canal through such land and the partial or temporary appropriation, use or occupation of such land, and they were also required to describe and ascertain the bounds of the land by them valued, and the quality and duration of the estate in the same, required by the agents of the Commonwealth for the use of the State. The Act then proceeded to declare, that on payment of the valuation made by the viewers, the State should be seized of such lands as of an absolute estate in perpetuity, or with such less quantity and duration of interest or estate in the same, or subject to such partial or temporary appropriation, use or occupation, as shall be required and described as aforesaid, as if conveyed by the owner or owners. Thus a clear distinction was made between the land required for temporary use and that taken for the canal itself. Of the former it was in substance declared, that the seisin of the Commonwealth should continue only so long as the temporary use was required. Of the latter, the seisin was declared to be in perpetuity, as if conveyed by the owner or owners. Nowhere in the Act was any authority given to the viewers, when the assessment become necessary, in consequence of the disagreement of the parties, to assess damages for a right of passage alone, such as is appropriated under our road laws generally, or under laws incorporating railroad and canal companies. Necessarily, therefore, the appropriation of that which was required for permanent use was an appropriation in fee." (50 Pa. St. 436–37.)

"As already remarked, a distinction was marked between such as was required for permanent occupation and that required for temporary use. That required for the bed of the canal, its tow-

paths and embankments, as was the land now in controversy, could only have been designed for permanent use, and in fact, the fee was required. In addition to this, the Act of 1827 made it unnecessary for the viewers to ascertain and describe the quality and duration of the interest and estate required in lands upon which the canal itself was located. Under the Act of 1826, proceedings for valuation could have been instituted before any work was done upon the land of an owner. In such a case it was necessary, not only to describe the bounds of the land valued, but the uses for which it was required, whether temporary or permanent. But when, by the Act of 1827, it was provided that valuations and assessments should not be made until after the completion of the work, the reason for requiring a description of that intended for permanent use, ceased. The extent of the property thus appropriated was defined on the ground, and the nature of the interests required was plainly indicated. There was no *longer* temporary use, and that which was permanently appropriated was marked out. Upon this subject the language of the Court in Commonwealth vs. McCallister, is very plain. One of the exceptions in those cases was 'that the owners (viewers?) did not ascertain and report the quality and duration of interest in the premises required by the canal commissioners for the use of the State, as required by law and the order of the Court.' Upon this the Court said: 'By the Act of 9th of April, 1827, the viewers are not to be called upon to view the ground and make report until after the work of the canal has been completed through the land of the applicant. The canal being finished through his land, it is obvious then that the State has no use, after that, for any part of the land, except that upon which the canal has been located and made, which is necessarily wanted in perpetuity. The use to which it has been appropriated by the State is a sufficient indication of the quality and duration of interest

and estate that is required by her in it, and the applicant has clearly a right to claim compensation for the fee simple of it.'" (Id. 439.)

In this case the Supreme Court of Pennsylvania held that the location of the canal through Haldeman's land having been changed, and the old canal filled up, the fee simple of the land still remained in the State and passed from it to the Pennsylvania Railroad Company.

C.—Acquisition from Individual Owners.

We have shown that the canal was constructed on the then *ripa* of the Potomac river, and that after its construction the towpath bank of the canal became the new *ripa* of the river; and have further shown that the legislative acts under which the canal was built authorized and required that the land permanently occupied for the canal, towpath and other permanent works should be acquired and held by the canal company in fee simple absolute.

Upon the construction of the canal, the public rights which follow the ebb and flow of the tide extended no further than the towpath bank of the canal, and all between the tide line on that bank and the upland became private property, to be held in absolute ownership like the original upland. The new upland strip bordering on the tideline on the south, and extending to and including the berm bank of the canal on the north, was held by the canal company for its towpath and canal and other permanent works, under its charter, which, as we have already shown, required an absolute estate in perpetuity in the lands necessary for such permanent works. Of the fact of the taking, the owners of the lots had notice by the actual construction and exclusive use of the canal, and of the character of the estate claimed by the canal company they had notice by the public act chartering the canal company and the

subsequent acts relating thereto. Aside from any deed from the lot owners to the canal company, or any recognition in the deeds under which the other appellants now claim, of the possession and ownership of the canal company, we contend that the possession by the canal company, for the period of prescription, of this strip of land bordering on the south upon the tide water of the Potomac river, constitutes that company the absolute owner of that strip of land as against the owners of the lots at the time of the construction of the canal, and their successors in title.

In the case of Sharon vs. Tucker, 144 U. S. 533, Mr. Justice Field, in delivering the opinion of the Court, after citing the statute 21 James 1, ch. 16, says, (page 541):

"Twenty years is, therefore, the period limited for entry upon any lands within this District after the claimant's title has accrued. After the lapse of that period there is no right of entry upon lands against the party in possession, and all actions to enforce any such alleged right are barred. Complete possession, the character of which is hereafter stated, of real property in the District for that period, with a claim of ownership, operates, therefore, to give the occupant title to the premises. No one else, with certain exceptions—as infants, married women, lunatics and persons imprisoned or beyond the seas, who may bring their action within ten years after the expiration of their disability—can call his title in question. He can stand on his adverse possession as fully as if he had always held the undisputed title of record."

And again, on page 544, the learned Justice says:

"'As a general doctrine,' says Angell, in his treatise on limitations, 'it has too long been established to be now in the least degree controverted that what the law deems a perfect possession, if continued without interruption during the whole period which is prescribed by the statute for the enforcement of the right of entry, is evidence of a fee. Independently of positive or statute law, the

possession supposes an acquiescence in all persons claiming an adverse interest; and upon this acquiescence is founded the presumption of the existence of some substantial reason (though perhaps not known) for which the claim of an adverse interest was forborne. Not only every legal presumption, but every consideration of public policy, requires that this evidence of right should be taken to be of very strong, if not of conclusive force.'"

Section 19 of the Canal Company's charter provides:

"That whenever it shall become necessary to subject the lands of any individual to the purposes provided for in this Act, and their consent can not be obtained, it shall and may be lawful for the company to enter upon such lands and proceed to the execution of such works as may be necessary; and that the pendency of any proceedings in any suit in the nature of a writ of *ad quod damnum*, or any other proceedings, shall not hinder or delay the progress of the work."

Under this provision it was not necessary for the company to acquire title before subjecting the lands to its use, but it occupied the same position as did the Pennsylvania Canal under the statutes cited in the case of Haldeman vs. The Pennsylvania Railroad Company, 50 Pa. St., which we have quoted. As stated in that decision, the construction of the permanent works of the company upon the land of an individual was notice to him that the company required an absolute estate in perpetuity in the land so subjected to its purposes. Should the company unreasonably delay to make compensation to him, either as agreed on between them or as fixed by the condemnation jury, the land owner had his remedy to compel such payment.

Compton vs. Susquehanna Railroad, 3 Bland, Ch. 886.

Under the facts of the present case, where the possession has continued for more than fifty years, the presumption of law is

conclusive that some settlement was had between the owners of the lots and the Chesapeake and Ohio Canal Company, by which that company acquired the rights which they claim and exercise in their permanent works, which right, we have already shown, was to stand seised of the same as of an absolute estate in perpetuity.

The absolute and exclusive character of the Canal Company's possession will further appear by reference to the Acts of Congress of March 3, 1837 and September 20, 1850, fully quoted under a subsequent heading of this brief.

As already stated, there is documentary evidence in the record of such settlement between the Canal Company and the lot owners as to lots 2, 4, 5, 8, 9, 10 and 11, in square 63. As to lots 2, 4 and 5, that evidence consists in formal deeds from the then lot owners to the company, which are found at pages 972, 973, 974 of the Record. The deed for lot 4 is dated January 21, 1835; that for lot 5, January 20, 1833; and that for lot 2, July 25, 1859.

The appellants claiming by virtue of their alleged ownership of these several lots base a contention on the character of these deeds, which it is necessary here to notice. That contention is that the respective deeds described the land conveyed by metes and bounds, and did not in terms call for the Potomac river as a boundary; that the effect of the deed therefore is to leave in the respective grantors and their successors in title the riparian rights incident to their original lots. The case of Giraud's Lessee vs. Hughes, 1 Gill & John. 115, is conclusive against this contention. The point decided in that case is thus stated by this Court in Jones vs. Johnson, 18 Howard, 157:

"The case of Giraud's Lessee vs. Hughes, et al., 1 Gill & Johnson, 249, asserts a similar principle. There, Gist's inspection, a grant as early as 1732, was bounded by one of its lines in the waters of the Patapsco river, afterwards a basin of Baltimore; the

lines, however, were given in the grant by courses and distances, and did not call for the river. Hughes held under this grant by deed in 1782.

"Before 1812 the waters of the Patapsco had gradually receded and formed a body of firm land, which had been surveyed and patented by the State to the plaintiff. The question was whether or not Hughes was entitled to this alluvial deposit as the adjoining owner to the river. It was not doubted by the counsel or Court, but that, if the grant of Gist's inspection had been bounded on the river, this boundary of the tract would have included the land made by the recession of the water; and the Court even held that as the original location of the tract extended into the river it entitled those holding under it to the land, on the ground that the principle governing these alluvial accretions gave them to the adjoining owner. In other words, the description in the original grant gave, in legal effect, to the grantee, a water boundary, and if so, the boundary included the accretions."

The Maryland Court, in the case referred to, commenting on the principle as stated by Blackstone, 2 Blk. Com. page 261, says, (1 Gill & John. 264):

"It is not then upon the principle that the land calls for the water that the owner acquires a title to the soil so formed, for, continues he, *de minimis non curat lex*; and besides, these owners being often losers by the breaking in of the sea, or at charges to keep it out, this possible gain is therefore a reciprocal consideration for such possible charge or loss; here we have in plain and strong language the reason of the rule, which places the acquisition of the additional soil by the owner of the adjoining land, upon the ground that he might be a loser by the breaking in of the sea, or at an expense to keep it out. And to bring the case within the operation of the rule, it is only necessary that the land should be adjoining the water."

The same principle is held to apply to the other rights of a riparian owner, by this Court in the case of the Potomac Steamboat Co. vs. Upper Potomac Steamboat Co., 109 U. S. 682, 683, where the Court cites with approval the language of Pollock, Chief Baron, in Stockport Water Works Co. vs. Potter, 3 Hurl. & Colt. 300–326: "It seems to us clear, that the rights which a riparian proprietor has with respect to the water are entirely derived from his possession of land abutting on the river. If he grants away a portion of his land so abutting, then the grantee becomes a riparian proprietor and has similar rights."

The deeds in question here not only conveyed the land by fixed boundaries, which by the evidence in the case is shown to be land actually abutting on the river, but the conveyance in each case includes "all and singular the improvements, rights, privileges and appurtenances to the said part of lot now belonging or appertaining." These deeds, therefore, fall within the decision in Williams vs. Baker, 41 Md. 523–528, where the question arose—whether a lease for 99 years, by ascertained and fixed boundaries not calling for the water, carried to the lessee the right to the alluvion. The Court says: "Here the lessor not only assigned and conveyed to the lessees, for the term of 99 years, renewable forever, the lot in question, by fixed and ascertained boundaries, but also 'all the improvements thereon made, lanes, alleys, waters, privileges, appurtenances and advantages to the same belonging, or in anywise appertaining.' That the lessor was entitled to the accretion by alluvion as a right incident and appurtenant to the ownership of the lot, is conceded, and if so, the language used in this lease is certainly broad and comprehensive enough to convey to the lessee, 'every right of enjoyment and possession in, or appurtenant to the ground leased which the lessor had, to be held and enjoyed by the lessee so long as he pays his rent and performs his covenants.'"

As to lots 8, 9, 10 and 11 in square 63, the deeds under which the other appellants claim, recognize possession of the canal company, and except such parts of the lots as "have been taken and are now held by the Chesapeake and Ohio Canal Company (Record, page 817), and as to lot 9, "such part thereof as has been heretofore condemned for the use of the Chesapeake and Ohio Canal Company, and is now occupied by the canal or works of said company." The effect of these conveyances is to pass only so much of the lots as lay between the berme bank of the canal and Water street on the north. The counsel for these claimants seems to have an idea that under these deeds (on page 817 of Record) there passed strips of land of the width of the respective lots, extending from Water street, on the north, to the middle of the Potomac River, on the south, excepting a strip of land across the middle of such strips, which was held by the canal company. We submit that this is a total misconception of the legal situation and the legal effect of these deeds. Prior to the construction of the canal, a conveyance of one of these lots, passed no such strip of land as that supposed. Such a conveyance passed a strip of land the width of the lot extending from Water street to high tide line of the Potomac river. With that strip of land passed, as appurtenances, certain rights in the land under water between the side lines of the lot extended into the water. After the construction of the canal, a conveyance of the lot, excepting so much thereof as was held by the canal company, bounded the land conveyed on the south by the north line of the canal company's works. No part of the lot lay south of the canal, it being established by the testimony of all parties that the tide waters of the Potomac came up on to the canal towpath bank.

The documentary evidence of the acquisitions by the canal company in and along Square 89, consists of a deed for the whole of lot No. 14 from Fleet Smith to Ingle, Bradley and Cox, trustees for the canal company, dated August 16, 1833 (page 978

of the Record), a deed from the Bank of the United States to the canal company for parts of lots 8, 9, 10, 11, 12 and 13, described by courses and distances: "Together with all and singular the improvements, ways, water courses, rights, privileges, hereditaments and appurtenances whatsoever to the said hereby granted premises belonging or in anywise appertaining."

What we have already said in regard to the effect of the deeds to the canal company in Square 63, applies equally to this deed of the Bank of the United States, and also what has been said as to the effect of adverse possession of the canal company is equally applicable to that portion of the canal along Square 89.

Plat exhibit G. P. No. 11, opposite page 128, appendix, part 2, shows the actual location of the canal, and shows that the canal passes diagonally from southwest to northeast through the upper portion of square 129, passing altogether into B street at point opposite 19th street.

The first conveyance of lot No. 2, in square 129, shown in the record, is the deed from Charles Douglas, commissioner of public buildings, to Samuel DeVaughn, dated March 2, 1848.

At the time of the construction of the canal, therefore, this lot was still in the United States, and the effect of the occupation of the canal company will be discussed under a subsequent head of this brief.

The plat referred to (Exhibit G. P. No. 11) shows that the canal towpath took about one-half of the frontage on B street of lot No. 1, in square 129; leaving as to that half of the lot no upland between B street and the river.

The canal company, therefore, became the riparian owner by adverse possession as to the west one half of the frontage of lot No. 1 on B street, with all the riparian rights incident to the ownership of that half of the lot.

Square south 22, so called, seems never to have been laid off by the commissioners. Their letter to Nicholas King, attorney for

Mr. Peter (found at page 900 of the Record), contains the statement that there is some high ground between Water street and the water south of square No. 22, and that the commissioners "have no objection to laying out a new square between Water street and the channel, and divide such square, when laid out, so as to make it as beneficial to Mr. Peter and the public as circumstances will admit."

Not having been laid out, it is an open question whether this land reverted to Mr. Peter under the terms of the deeds of trust from the original proprietors, or whether it remained in the United States, as beneficiaries under that deed. However that may be, there is no possible doubt that the canal company took and occupied whatever upland there was between Water street and the river south of Square 22, as well as the southern portion of Water street itself, and that after the construction of the canal the new *ripa* of the Potomac river was the towpath bank of the canal.

If Mr. Peter was the beneficial owner of the land south of Water street, opposite square 22, at the time the canal was constructed, the exclusive and uninterrupted occupancy of that land by the canal company for fifty years must be held in law to be conclusive evidence that Mr. Peter conveyed his land to the canal company. If, on the other hand, the beneficial ownership of that land, at the time it was taken by the canal company, was in the United States, then we contend that the canal company acquired it and all rights belonging to it by virtue of the Acts of Congress authorizing the construction of the canal, and subsequent Acts relating thereto.

II.

Title of the Canal Company by virtue of the Grant to it of the Riparian Lands of the United States.

Under this heading we shall discuss the rights acquired by the Canal Company in its works, where the same were constructed on the margin and in the waters of the Potomac river, south of square

22, opposite the south line of 25th street, along and opposite the shore of Reservation No. 4, opposite the south end of 23d street, south end of 22d street, south end of 21st street, along and below the south line of B street between 21st street and 20th street, south end of 20th street, and through Lot 2 of square 129, and in and along B street extended, between 18th and 17th streets; also, south of such of the lots in squares 89 and 63, as remained unassigned and undisposed of by the commissioners at the time of the construction of the canal.

The charter of the Chesapeake & Ohio Canal Company recites, in the preamble, the purpose to provide for a navigable canal "*from the tide water of the Potomac river, in the District of Columbia,* to the mouth of Savage Creek, on the North Branch of said river, and extending thence across the Allegany mountains to some convenient point on the navigable waters of the river Ohio or some one of its tributary streams, *to be fed through its course on the east side of the mountain by the river Potomac and the streams which empty therein.*"

By the 21st section of the same Act it is provided: "That the Government of the United States shall retain the power to extend the said canal in or through the District of Columbia on either or both sides of the river Potomac."

By the Act of Congress of May 23, 1828, it is provided that the authority of Maryland and Virginia to authorize the construction of lateral canals to connect with the Chesapeake and Ohio Canal shall be as complete in all respects as the authority granted by the original Act of incorporation "to the Chesapeake and Ohio Canal Company to extend the main stem of the said canal within the said District, or the authority reserved to the Government of the United States to provide for the extension thereof on either or both sides of the river Potomac within the District of Columbia."

By the Act of May 24, 1828, authorizing the subscription by the United States for ten thousand shares of the capital stock of the company, special provision is made for the elevation and width of the section below the Little Falls, so as to provide a supply of water for lateral canals or the extension of the Chesapeake and Ohio canal by the United States.

It is clear from these provisions that Congress contemplated the location of the Chesapeake and Ohio canal along the bank of the River Potomac within the District of Columbia; it was left open to the canal company to fix its actual terminus and to decide upon the most practicable route for the construction of the canal and works most expeditiously and economically and at the proper elevation to get the requisite supply of water, and at the same time reach tide water.

In Appendix A we state the action of the stockholders of the company in 1828, fixing the terminus of the canal at the Tyber basin, and the subsequent action of those stockholders, in 1831, when by the vote of the stock of the United States and the city of Washington the construction of the canal from the Rock Creek basin to the Tyber basin, along the route now occupied, was urged to a speedy completion. This action was taken under the advice of William Wirt, Attorney General of the United States, whose elaborate opinion on the subject will be found in the bound volume of the reports of the Chesapeake and Ohio Canal Co., filed as Exhibit C. & O. No. 3, beginning at page 36, and was the subject of judicial examination and approval in the case of Chesapeake and Ohio Canal Co. vs. Key, 3 Cranch C. C. Rep. 599. This contemporary construction of the charter is strongly persuasive, followed, as it has been, by the unchallenged exercise of the charter rights assumed by the company under that construction.

The legal effect of the fixing of the terminus of the canal at the Tyber basin, at the foot of 17th street, was the same as if the charter had itself designated that as the point on tide water, in the District of Columbia, at which the canal should begin, and had then provided that from that beginning point the canal company should be authorized and empowered to construct its canal and works by such route as it might select as most eligible westward along the Potomac River.

It is familiar law that when an act of the legislature authorizes the construction of a work of internal improvement, or other work, public or *quasi* public, between designated termini or along a designated route, the act confers power on the company so authorized to appropriate for its purposes the public lands lying between those termini or along that route and coming within the line of the route reasonably selected as most eligible by the company, and this statement is equally true of lands under navigable waters. 1 Redfield on Railways, section 78, sub-section 7, and cases cited. The Indiana, &c., Ry. Co. vs. State et al., 3 Ind. 421. Fall River Iron Works vs. Old Colony, &c., R. R. Co. 5 Allen, 221. City of Georgetown vs. Alexandria Canal Co., 12 Peters, 91.

But this is not all. After the construction and completion of the canal to the Tyber basin, over and opposite to the lands of the United States, now in question, the Congress of the United States by repeated acts recognized the legality of the possession by the Canal Company of the canal and works so constructed, and conferred upon the company additional rights, powers and remedies in connection with its said canal and works.

By the Act of March 3, 1837, Congress adopted and enacted as a law of the United States in force in the District, the provision of the Virginia Act of February 27, 1829, as follows:

"That whenever it may be necessary to form heavy embankments, piers or moles, at the mouths of creeks or *along the river*

shore, for basins or other purposes, and the president and directors may deem it expedient to give a greater strength to the same by widening them and constructing them of the most solid materials, the ground so formed for such useful purpose, may by them when so improved be sold out or let for terms of years, as they may deem most expedient for the company on such conditions as may direct the application of the proceeds thereof to useful purposes and at the same time repay the necessary expense of the formation of such banks, piers or moles; provided that this power shall in no case be exercised so as to injure the navigation of the canal."

The second section of this Act of 1837, further enacted a penalty by fine and imprisonment against any person who should "within the District of Columbia, wickedly or maliciously do injury to the Chesapeake & Ohio Canal, its embankments, walls, moles, tow-paths, bridges, culverts, drains, or to any part necessary to the uses and purposes of said canal;" and further provided, "that nothing in this Act contained shall be so constructed as to prevent said Canal Company from recovering damages from any person or persons who may commit any of the trespasses aforesaid."

Section 3 of this Act of 1837 enacted, "that all condemnations of land for the use and purposes of said canal company, which have heretofore been made by the marshal of said District, or any lawful deputy marshal, shall be as valid as though the same had been situated in the State of Maryland, and had been condemned in pursuance of the laws of said State through the action and agency of a sheriff of any of the counties of said State."

By the Act of February 7, 1845, Congress authorized the canal company to mortgage all its lands, works, property and franchises in the District.

By the Act of September 20, 1850, Congress enacted: "The assent of the United States be and the same is hereby given to the Act of the General Assembly of Maryland, passed at December

session, 1844, chapter 287, * * * and to each and every provision thereof; and that the same be and are hereby extended to so much of the said canal as lies within the District of Columbia in as full and effectual a manner as if the several provisions aforesaid were hereby formally enacted."

"The first section of the Act of Maryland thus re-enacted by Congress, provided for the criminal prosecution of any person or persons who should wilfully or maliciously open or close any waste gate or any gate or wicket of any lock of the Chesapeake and Ohio Canal, or who should wilfully or maliciously by any means whatever, injure, impair, break or destroy any part of the Chesapeake and Ohio Canal, or any part of its feeders, dams, locks, acqueducts, waste weirs, culverts, walls, embankments, bridges, buildings, or other works *now constructed* or which may hereafter be constructed by the Chesapeake and Ohio Canal Company," &c.

By its second section it enacted a penalty against any person who should carelessly or neglectfully, by any means whatever, injure, impair, break or destroy any part of the Chesapeake and Ohio Canal.

The fourth section of the Act of Maryland, made the law of the District, provides "that no person or persons shall anchor or place any vessel, boat or other thing so near any of the outlets or guard locks of the said Chesapeake and Ohio Canal as to obstruct or impede the use of such outlet or guard lock; nor shall any person or persons, without the consent of the said company previously obtained, build or erect on or against the towpath or embankments of the said canal or on the lands of the said Chesapeake and Ohio Canal Company, any house, shed, building, wharf or other fixtures, and any person or persons offending against the provisions of this section shall pay to the said company the sum of twenty dollars for each offence, to be recovered by the said company in

the same manner as small debts are recovered. And the said company, by its officers, agents and servants, may remove any of the obstructions, houses, sheds, buildings, wharves or other fixtures prohibited by this section."

Section 10 of said Act, so made the law of the District, provides "that the connection of any fence or wall with the works of the said Chesapeake and Ohio Canal Company in the manner authorized by the second section of the Act of which this is a supplement, or the erection of any fence, wall or building upon the land of said company, whether with or without the permission of the said company, however long the same may remain, shall not be deemed or held in the law as an adverse possession, so as to deprive the said company of its rights in or to the said land."

We submit that the legal effect of the congressional legislation we have cited was both by original grant and by legislative recognition to vest in the Chesapeake and Ohio Canal Company the land of the United States, occupied by the company's permanent works, with the same title in the company as that which it was authorized and required to have in its other land acquired for such permanent works, to wit, an absolute estate in perpetuity.

The Acts of 1837 and 1850, from which we have quoted, not only recognize the lawful, exclusive and absolute possession and ownership of the canal company in all its canal and works within the District of Columbia; but they recognize—the Act of 1837 especially—that as incident to its ownership of towpath embankment "along the river shore" the canal company has the right of the riparian owner to fill out into the water and make additional land, which, when made, will belong to it.

That last mentioned Act specially provides that when the canal company shall have exercised this right of the riparian owner, and shall, by its exercise, have made additional dry land, it may sell out or let for terms of years "the ground so formed."

It is difficult to see how the Legislature could have given more specific recognition to the ownership and rights of ownership claimed on behalf of the canal company in this case.

Claims of the Other Defendants.

The appellants claiming adversely to the canal company are:

1. The several appellants claiming as successors in title to the owners of the original lots in squares 63, 89, 129 and south of 22. While we have had to answer incidentally some of the contentions on behalf of these alleged lot owners, we have not undertaken a careful analysis of their respective claims.

2. The claims under the so-called Kidwell patent. For the general objections to those claims we expect to rely on the brief and argument on behalf of the United States.

3. The appellants claiming under the grant to Lord Culpeper.

4. Claim of Henry H. Dodge. Mr. Dodge claims under an alleged lease or covenant for a lease from the Chesapeake and Ohio Canal Company; he therefore claims in the right of the canal company as do also these trustees. We do not anticipate that the Court on this appeal, will undertake to settle the conflicting claims between Mr. Dodge and the Chesapeake and Ohio Canal Company or between Mr. Dodge and these trustees for the bondholders of the Chesapeake and Ohio Canal Company. We therefore forbear, at this time, any attack on the claim of Mr. Dodge. When the rights of the canal company are fully ascertained and settled, it will then be necessary to decide upon the conflicting claims of those claiming through the canal company, or as its assignees.

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of Counsel.

APPENDIX A.

The Chesapeake and Ohio Canal Company was incorporated by the Act of Virginia, passed January 27th, 1824. The Virginia Act was accepted and confirmed by Maryland, by Act of the December session, 1824, chapter 79, passed January 31, 1825. By Act entitled "an Act confirming the Act of the Legislature of Virginia, entitled 'an Act incorporating the Chesapeake and Ohio Canal Company,' and an Act of the State of Maryland confirming the same." Approved, March 3, 1825 (4 Stat. at Large, 101), Congress enacted, "that the Act of the Legislature of the State of Virginia, entitled, 'an Act incorporating the Chesapeake and Ohio Canal Company,' be and the same is hereby ratified and confirmed so far as may be necessary for the purpose of enabling any company that may hereafter be formed by the authority of said Act of incorporation, to carry into effect the provisions thereof, in the District of Columbia within the jurisdiction of the United States and no further." The charter Act of Virginia and the subsequent Acts of Congress, Maryland and Virginia, down to 1828, will be found in Appendix 1, 4 U. S. Stat. at Large, 793 to 810.

The preamble of the charter described the canal to be constructed as "a navigable canal from the tide water of the river Potomac in the District of Columbia to the mouth of Savage Creek on the north branch of said river, and extending thence across the Alleghany Mountain to some convenient point on the navigable waters of the river Ohio."

By resolution of the stockholders of the company adopted at their meeting held September 10th, 1828, the eastern terminus of the canal was fixed at the Tyber basin, at 17th street.

The construction of the section of the canal from the Rock Creek basin to the Tyber basin was begun shortly thereafter. Owing to the demands on the company's treasury for the prosecution of the difficult work on the sections in Maryland, the work in Washington was not pushed rapidly, until the stockholders, at a meeting called especially to consider the matter, 1831, adopted a resolution peremptorily requiring the directors to complete speedily the work in Washington. This resolution was carried through the efforts of those representing the stock interests of the United States and the city of Washington, and by the vote of their stock.

The construction to the Tyber basin was accordingly put under contract at once; and, but for the cholera epidemic of 1832 would have been completed in that year. The canal was fully opened for boats to the Tyber, prior to 1836.

From 26th street eastward, the canal was constructed either on the margin of the river or below the line of high tide except through the rocky point in Reservation No. 4, known as the "Key of all Keys." At all other points the canal was in part, at least, outside the high tide line. The map of the proposed location of the canal filed as Exhibit C. & O. No. 1, with the answer of the Canal Company, does *not* show the location of the canal as actually constructed. The value of that exhibit lies in the cross-sections or profiles thereon showing the topography of the location proposed. The canal, as actually constructed, was located much further south, toward, and into the river, as will appear by all the maps and plats in the case which purport to show the completed canal. Plat exhibit G. P. No. 11, opposite page 128 Record Appendix, part 2, shows the actual location of the canal.

All the witnesses agree that the tide-water came up on the south or tow path bank of the canal, after its completion, and all the maps and plats show the same thing.

JOHN B. DUNCKLEE, a witness sworn for the United States, on page 43 of the Record, near the top of the page, testifies as follows:

Referring to map filed as "Exhibit U. S. No. 8."

"Q. Upon this map, which has just been filed as 'Exhibit U. S. No. 8,' what is indicated by the shaded portions marked by the lines A, B, C, D, E, F and G?

A. It indicates that the area was marshy and overflowed by tides.

Q. The scale upon this map will enable us to ascertain by its application to the marshes, the size of the same?

A. It will.

Q. I notice upon this map, (Exhibit U. S. No. 8,) beginning about where the letter H stands, some figures in red ink running southward from the letter H; what do they indicate?

A. They indicate the levels taken from the original marsh to determine the amount of filling to be done under a contract, under the direction of Colonel Hains. They represent the heights above low tide.

Q. And the figures in black ink, which are scattered on this map, what do they indicate?

A. They indicate the depths of mean low tide.

Q. In feet.

A. In feet and tenths of a foot.

Q. Of water at mean low tide?

A. Yes, sir.

Q. *The marsh referred to on this map, bounded by the line A. B. C. D. E. F. G. is bounded on the north by what?*

A. *On the north by the old Chesapeake and Ohio canal.*

Q. Which I understand is bounded on the north by the main land of the city?

A. Yes, sir."

On page 187 of the Record, WILLIAM G. A. TANNER, a witness, sworn for the United States, testifies as follows, in ninth line from top of page 187:

"Q. Where did you start from that day?

A. Got in the canal boat at the old canal at the foot of Seventeenth street, where the lock was.

Q. You got in the canal at the foot of Seventeenth street?

A. No, sir; beyond that on the side where they came down from the monument.

Q. You did not get in from the shore at Easby's Point?

A. Went from the monument up to Georgetown.

Q. In what direction?

A. From the bend, came through the lock and toward the glass house, where it is now. *That was the canal. What divided the the river from the canal was the towpath.*"

On page 191 of the Record, ARTHUR HEISLOP, a witness sworn for the United States, testifies as follows, line 13 from top of page 191:

"Q. In your recollection of that locality what was the condition of these flats at high tide?

A. *The water came up to the towpath.*"

On page 195 of the Record, this witness, upon cross-examination, testifies as follows, line 9 from bottom of page 195:

"X-q. I am talking of that section right along by Easby's. How wide was this towpath which you have spoken of from the ordinary river water edge?

A. I could not say.

X-q. About how high?

A. I suppose five feet from the bed of this little drain up to the level of the towpath. I suppose it was five feet as far as Cumberland's shop.

X-q. I am talking of that section. At high tide the water was on the edge of the tow path?

A. *Yes, sir; right on the bank, butted right up against the tow-path, the water did.*"

On page 232 of the Record, JOHN W. EASBY, a witness sworn for the United States, testifies as follows, line 10 from bottom of page 232:

"Q. Do you remember the construction of the canal along there?

A. *Oh yes sir; very well. The canal was being built and dug out. The rocks were being blasted when my father was building his first ship; I recollect that very well. I remember it because, when I was a boy around there, when the men would cry out "fire," the carpenters would run under the staves.*"

On page 235 of the Record, this witness on cross-examination testifies, about half way down page 235:

X-q. At Easby's Point you think it was twelve or eighteen inches?

A. Yes, sir, and soon it cut right into the main channel. I think I had better explain right here a point. I do not know that it is of any consequence. *But when I was a boy and this canal was being excavated, there was no towpath along there; but when they made the towpath it squeezed the mud out, and that made that little channel there.*

X-q. *Prior to the making of the towpath, the water that hugged the shore along down was of considerable depth, was it not?*

A. Yes, sir! but I do not know how deep.

X-q. Several feet deep?

A. Yes, sir!

X-q. *And in making the towpath and filling in along the shore the mud squeezed out toward—*

A. *The opposite shore, allowing room enough for the canal.*

X-q. *After that, the residue of that water, the deep channel, was what you now describe as being the interval between the towpath and flats?*

A. *Except that it became gradually decreased. When they put solid earth on the soft mud, it pushed part of it into the river and part of it into the canal, and it had to be dug out afterwards. That made the little channel.*"

On page 263 of the Record, FRANCIS M. BRYAN, a witness sworn for the United States, testifies as follows, about middle of page 263:

"Q. In your first recollection, was any portion of the flats firm land, either at high or low tide—land that you walk on?

A. *No, sir; nothing of that kind, unless at the towpath between the canal and the river.*

Q. I am speaking of off the shore?

A. *Beyond that, my recollection is that there was a good solid gravel towpath, between the canal and the river, on the shore. There was a rubble rock there, and then there was a little branch, possibly twelve inches of water in it at low tide, running off to four or five inches in the center. I have chased catfish out of that when a boy. There was no solid ground there beyond this rubble stone.*

Q. *Was that rubble stone a support to the bank of the canal?*

A. *Yes, sir. It was a support.*"

On page 339 of the Record, THOMAS J. GALT, a witness sworn for the United States, testifies as follows, near top of page 339:

"Q. In your recollection, at the time you spoke of here, was there any navigable commercial channel up the shore that was used for ordinary trade purposes?

A. In 1867?

Q. Yes; and long there?

A. *No, sir; because there never was any thing navigable in that region after the Chesapeake and Ohio Canal Company put the canal there. But before that date, there was a swash channel that went up there that would carry vessels drawing seven and eight feet of water up to the old glass house.*

Q. Did that swash of which you speak go as far as the glass house before the Chesapeake and Ohio Canal—did that go any farther than the old glass house?

A. Up to Easby's Point at a little bar out there—the channel seemed to start from Easby's Point or just a little this side of it.

Q. Was there any clear connection between that channel and the Georgetown channel that you could use?

A. None; the channel made up there to the glass house property; there it went up, and there was a wharf fifty feet wide and seventy feet long running out into the channel.

Q. How long has it been since that wharf was used?

A. *It has been a long time. The Chesapeake and Ohio Canal—you have data here to show what time that started—in* 1827, *was it not?*

Q. *The first one started in Georgetown in* 1827, *and the one of which you spoke was in the thirties.*

A. I think it was. I remember, pretty well it was in the thirties—on this side, this branch down here; because I remember distinctly when John Quincy Adams put the spade in above Georgetown.

Q. You say the construction of this canal destroyed the swash that existed there?

A. *Well, to a certain extent it did; but there always appeared to be a stream running around there alongside the towpath. They built the towpath in there with rubble stone and dirt; and then* there was also a kind of a little channel that came around—made around my wharf."

On re-direct examination, on page 345, this witness testifies as follows:

"Q. *The glass-house wharf was never in operation after the construction of the canal,* was it?

A. *No, sir, I do not think it ever was. Before the Chesapeake and Ohio Canal was constructed, there was a beautiful beach in front of the Van Ness place, and when the towpath was put along there and the Canal constructed, of course, that destroyed this beach.*"

On page 401 of the Record, GEORGE W. HARKNESS, sworn as witness for the United States, testifies as follows:

"Q. What is your age?

A. I am seventy-five years old and over.

Q. You have lived in Washington all your life?

A. Mostly always, with the exception of about three years out, from 1832 to 1835.

Q. Have you any knowledge of the river front from Easby's Point down to the Long Bridge, and this side of the Georgetown or Virginia Channel?

A. I have roamed around there a good many years in my boyhood days, gunned around there and swam around there.

Q. About how long ago is it since your first definite recollection of matter in that vicinity began?

A. I should suppose that I was about ten years old when I used to gun around there.

Q. Your recollection will go back fifty years, will it?

A. Oh yes, sir.

Q. During that time were there any wharves in existence between Easby's Point and the Seventeenth street wharf?

A. *No, sir. Not any fifty years ago. The canal was made within fifty years and destroyed those wharves.* There was only one wharf there fifty years ago—the glass house wharf.

Q. Do you remember what time it was that the canal was cut through there?

A. *It was cut through there about 1831 or 1832.*

Q. That is upward of fifty years ago?

A. It is over fifty years ago; 1837 would make it fifty years.

Q. *In the last fifty years, there has been no wharf from Easby's Point down to Seventeenth street wharf?*

A. *No, sir.*

Q. *During that time had you any knowledge of a navigable commercial channel, available for ordinary purposes of trade along the shore from Seventeenth street up to Easby's Point?*

A. *No, sir.*

Q. *Was there any such channel there during that time?*

A. *No, sir.*"

On cross-examination of this witness, on page 404, at top of page, is as follows:

"X-q. *After the construction of the Canal, was or was there not a channel between the outer bank of the Canal and the inner or northern side of the Kidwell meadows?*

A. There was not what you might call a channel—sometimes you could not get up there—you could get up there at high tide in boats and skiffs, something like that, but a long boat could not get up there.

X-q. You could get up there when you could get over the flats?

A. Not around Easby's Point, but at the suck hole.

X-q. Where was the suck hole?

A. The suck hole was at the skating rink.

X-q. At what street?

A. Between Twenty-first and Twenty-second streets, the creek, that is the river, made up at high tide, and there was a cove made in it. *When they built the canal they had to put a sewer in there to*

keep the water from coming in. That is what they called the suck hole, and the tide would come in there, and it is there yet.

X-q. *Down about the observatory and old man Cumberland's place, what distance was there between the towpath of the canal and the beginning of the Potomac flats?*

A. *The towpath of the canal I reckon is around the observatory wall.*

X-q. I mean around there. What is the difference between the towpath or outer edge of the canal, and the flats?

A. *It is almost one continuous thing, right from the shore out.*

X-q. *There was no separation of deeper water between?*

A. *No, sir.*

X-q. *Up to what time are you talking about?*

A. *I am talking of since the canal was built.*

X-q. *And ever since the canal was built there has been nothing like a channel, depression or deeper water between the towpath and the flats?*

A. *No, sir.*

X-q. *Nothing whatever?*

A. *No, sir.*

X-q. *So that practically the flats were joined on to the towpath of the canal—for all practical purposes?*

A. *Yes, sir.*"

This same witness on re-direct examination, at middle of page 405:

X-q. "*The river front from Easby's Point down to Seventeenth street was considerably changed by the construction of the canal, was it not?*

A. *Yes, sir.*

X-q. *The greater part of the canal from Easby's Point to Seventeenth street was actually constructed through the river, was it not, that is, the towpath?*

A. *I think the towpath runs from Easby's to in front of Boyle's place what we call the Big Rock. It took that all away.*

Q. Do you remember where, what was called in your early days, the Hamburg wharf was located?

A. Yes, sir.

Q. Was that wharf built in a direction south or east of the glass house?

A. East, right in the cove.

Q. In your first recollection, the river took a bend there about the glass house did it not?

A. From the glass house it took a bend and came up to—

Q. Give us some point of a street where it touched before the construction of the canal?

A. It took a bend from Nineteenth street, I think, and coved in up as far D street.

Q. *Commenced where?*

A. At Nineteenth street and went down as far as Twenty-first or Twenty-second street, and coved all in there—

Q. You say it extended in as far as D street?

A. Yes, sir.

Q. So that the corner of Nineteenth and D streets, before the canal was constructed, would have been on the river shore?

A. Yes, sir.

Q. I understand you, the cove of which you spoke was between Nineteenth and Twenty-first streets.

A. Yes, sir.

Q. And extended as far as D street?

A. Yes, sir.

Q. *Putting the river shore at what is now D street?*

A. *Yes, sir.*

Q. This Hamburg wharf of which you speak, then, was constructed in a direction easterly from the glass house?

A. The glass house wharf was south of the glass house, south of the canal, and the old Hamburg wharf lay in this cove.

Q. And was constructed in an easterly direction?

A. Yes, sir. The canal cut it right through.

Q. *Then the squares which have an appearance or are laid out south of D street, must have been laid out in the water of this cove?*

A. *All under water—all covered with water. It was covered with water until Shepherd filled them up.*

RE-CROSS.

Q. You say that Boyle's the canal went into the river.

A. The canal went into the river right down from Boyle's."

On page 407 of the Record, JAMES KELLY, sworn as witness for United States, testifies as follows:

"Q. What is your age?

A. I am seventy-seven years old.

Q. Where are you employed at present?

A. In the War Department.

Q. Where have you lived during the seventy-seven years of your life?

A. My boyhood days were spent in Georgetown, but I have lived principally in Washington. I came to Washington when I was a boy and have lived here ever since.

Q. During your life, have you had opportunities of becoming familiar with the condition of the river front from Easby's Point down to the long bridge and this side of the Georgetown channel?

A. I remember perfectly well from Van Ness' wharf up to the glass house more than any other portion of it. I kept a boat there a long time, and I used to skate there.

Q. The glass house was at Twenty-first street?

A. The glass house wharf, I think, was situated at the terminus of Twenty-second street.

Q. The glass house was between Twenty-first and Twenty-second streets.

A. Oh, yes sir.

Q. You say that you have no knowledge of the condition of the river front above that toward Easby's Point?

A. The only knowledge I have is in regard to the Big Rock where they used to baptize.

Q. *Was that before the Canal was built?*

A. *Yes, sir. The tide used to make up to the beach from Boyle's (square south of* 22) *down.*

Q. The construction of the canal changed the appearance of the river front?

A. Yes, sir.

Q. Do you remember the old glass house wharf?

A. I remember it well.

Q. Do you remember when that ceased to be used?

A. I cannot remember the year. I do not remember the year.

Q. Well, of course it ceased to be used after the construction of the canal?

A. Oh, yes sir.

Q. *And the canal cut it off from the river?*

A. *Yes, sir.*"

On page 726 of the Record, CHARLES T. SMITH, sworn on behalf of Augustus Burgdorf, who claims part of square 89, about half way down on page 726:

"Q. Were you acquainted with the situation and condition as to enclosures, of lots 11 and 12, in square 89, which were conveyed by yourself and wife to Alexander Davidson and from him to Augustus Burgdorf?

A. Yes, sir.

Q. How long have you been personally acquainted with the condition of those two lots as to enclosure and occupation?

A. Well, ever since I was married; that was about thirty-one years ago.

Q. *Were they ever enclosed?*

A. *The Chesapeake and Ohio Canal was between those lots and the river front. All that portion of those lots which lay between the south line of Water street and the north line of the canal was enclosed by a fence, in my recollection, for the last thirty-one years.*"

On page 727 of the Record, the same witness on cross-examination, testified:

"X-q. *At that time the water of the river came up to the south bank of the canal along the sycamores there?*

A. *Yes, sir.*

X-q. And there was no space of any kind under enclosure south of the canal?

A. No, sir.

X-q. *There was nothing there south of the towpath of the canal and between it and the river and what is called the marshes or flats out there?*

A. *Nothing.*

X-q. Did Mr. Coltman own, or did your people claim as his heirs, any ground except what you have just been describing as connected with these lots which were sold?

A. *All the ground that was used was enclosed.*

X-q. Did you sell anything that was not enclosed; or, were you under the impression that you were selling anything not enclosed?

A. This ground was never sold by the square foot, but by the front foot on Water street, *and whether it had the privilege of going beyond the canal I do not know.*

X-q. Did you know that in point of fact, so far as the ground south of the canal was concerned, extending the imaginary lines of these lots, it met the water at the south bank of the canal.

A. Yes, sir.

X-q. And that the river was in front of it?

A. Not right up in front, but pretty close to it. The canal was there and navigable when I married into the Coltman family.

X-q. *There never was any such thing as a fence around the land south of the canal?*

A. *No, sir.*"

On pages 772 and 773, JOHN W. EASBY was sworn as a witness on behalf of himself and others, and testifies as follows, near bottom of page 772:

"X-q. This Lot 1, in square 129, I understand you to say was never enclosed?

A. No, sir. That is a good title.

X-q. And about these lots or parts of lots, or whatever they may be in square 63, were they ever enclosed?

A. They have been improved by the erection of limekilns on them, and by three small houses.

X-q. These limekilns were erected on the north bank of the canal?

A. Yes; *between the canal and the street.*

X-q. They were erected on the north side of the canal?

A. On the north side of the canal, but the canal had nothing to do with them.

X-q. *How about the portions of the lots south of the canal?*

A. No; we never did anything with those portions.

X-q. *The portions of the lots south of the line of improvement, as shown on this 'Exhibit U. S. No. 45,' have never been enclosed?*

A. *No, sir; we simply hold them.*

X-q. *And the same answer I suppose would apply to your lots in square 89?*

A. *Yes, sir.*

X-q. *South of the canal you never had them enclosed?*

A. No, sir. As to square 129, it is not bisected by the canal."

On page 868 of the Record RICHARD J. BEALL, was sworn as a witness for himself in regard to lot 2, square 129, and testified as follows, near bottom of page 868, on his cross-examination:

"X-q. How near did the water of the river come to B street at the time you bought your lot (1872)?

A. *I think the water was about the building line.*

X-q. About the building line of B street.

A. Yes, sir; that is, when I bought it, but I do not suppose it was over six or seven inches at high tide. There was grass growing right through it. I do not think there was five feet of it, but what was in grass, growing right through it.

X-q. The water of the river at high tide, at the time you bought, came up to the building line of B street?

A. I think so, as nearly as I can remember, to the building line of B street.

X-q. Do you remember when the Chesapeake and Ohio Canal was constructed along B street, in front of this lot?

A. No, I do not remember when it was constructed there. I remember when they cut it out up there in Montgomery county, near the Frederick line, along there. That was in 1832, when I was five years old.

X-q. When does your first recollection of the canal near the lot you claim commence?

A. When I came here in 1849, the canal ran along there and it seemed to me about like it was before they commenced filling up at that time.

X-q. *The bed of the canal near B street was built up in the river.*

A. I think there were boats in 1849 and 1850 that came down from Georgetown along that canal; there were locks and a small stone house there used by the lock keeper.

X-q. That is near Seventeenth street.

A. Yes, sir, corner of Seventeenth and B streets.

X-q. I am talking about up near your lot.

A. The water was in the canal.

X-q. *I am talking about the water of the river. In point of fact, at that point was not the Canal built through a portion of the water of the river? In other words, did they not have to bank up the canal on either side so as to make a ditch, and was there not on the city side of the Canal a big pond?*

A. Yes, between 20th and 21st streets.

X-q. You know the fact to be, that the canal does run along B street?

A. Yes, right along the centre of B street. It is filled up where the pavement should be for a towpath.

X-q. Did they not build the banks of the canal on either side, just in front of your lot and below it, through the water of the river; in other words, did they not take the flats there, and in extending the canal along B street, bank up on either side so as to hold the flow of the water; they made no excavation of any kind there did they?

A. No. They just raised up banks on each side to hold the water coming down the canal into the river at Seventeenth street."

On page 907 of the Record GEORGE W. HARKNESS, sworn for defendants, William L. Dunlop and George Peter, in regard to square south of 22, testifies as follows:

"Q. Where do you reside?

A. No. 1220 H street Northwest, in this city.

Q. How old are you?

A. Seventy-six years.

Q. Are you acquainted with the lands lying south of square 22, in this city.

A. Well, I cannot say that I am, because I cannot locate south of square 22, unless I had a map before me.

Q. Square 22 is where the Boyle house is located?

A. Well, I have some recollection about it, but it has been so long since, and I have not been there more than once or twice since the canal was cut through there.

Q. After taking out a street south of square 22, was there not some high land between that and the river at the time the canal was built?

A. Well I think not. A cove made in there from the Big Rock, all the way around up to Boyle's place and up around Easby's Point down there. There was considerable of a cove in there in my boyhood days. *After the canal was built, of course, they used the cove as a sort of a basin and throwed the towpath outside into the river.*

Q. Was there not high land between the north side of the canal and the street?

A. I could not say that there was. I have no recollection of it at all. I would not like to say; there might be and there might not be. It has been so long since the canal was cut through there and so long since I have been there, that I have no recollection of any thing more than the river shore. For a man to remember back sixty-five years he has to study up things. I have no recollection of any high land there.

Q. *Was the canal cut south of that street, through the land there?*

A. *Yes.* The Berme bank was filled out and took in part of that cove to make a sort of basin there. That is my recollection. *I think the river shore struck Boyle's place there."*

CROSS-EXAMINATION.

"X-q. Were you familiar and are you now familiar with the exact location of the south line of square 22 as laid out?

A. No, sir; I could not say that I am. I was down on that square in my boyhood days and I was there after I was a man grown, in the Boyle square, but it has been so long ago that I can not recollect enough to give a definite answer.

X-q. When the canal was built along in front of that square, between that square and the river, was it built entirely on dry land?

A. *I think not; I think that the towpath went out into the river into the water and they filled it up.*

X-q. You have spoken about a cove that made up in there. I will ask you to refer to this plat, being a copy of a map of Washington as to that section of the city, prepared by Nicholas King in 1803, and to examine the water line as it appears upon that plat, extending westwardly from appropriation No. 4, or the Observatory grounds, through square south of square 12, and say whether the cove that you speak of is indicated upon that map?

A. Yes, sir, that line indicates the cove I had reference to. There used to be a windmill on the point there when I was a boy; it was always called the "windmill point," until Captain Easby got down there with his shipyard, and then it was called "Easby's Point."

X-q. *There has been considerable ground reclaimed along there, constituting the towpath of the canal, through the water from this square, has there not, since the canal was made?*

A. *Yes, sir.* It was all filled up the last time that I was there, three or four years ago."

On page 912 of the Record, LYMAN A. LITTLEFIELD, sworn for defendants, claiming lot south of square 22, about midway down the page, testifies as follows (1872):

"X-q. *When you first went there, had there been any reclamation of land from the water, apparently, in front of this square, south of the south line of that square?*

A. *None that I know of.*

X-q. *The water ebbed and flowed up to the bank of the canal at that point?*

A. Yes, sir; it ebbed and flowed all through it; that is, this creek run up in there and made a kind of an island between that and the river.

X-q. Do you know how that island originated?

A. By sediment, I suppose, which has grown since I have been there."

On page 925 of the Record, WILLIAM FORSYTH, being sworn for some of the defendants, testifies as follows:

"Q. State your age, occupation and residence?

A. I am in my 69th year; Surveyor of the District of Columbia. I reside in Washington city, D. C.

Q. How long have you been Surveyor of the District of Columbia?

A. I was first appointed Surveyor of the District of Columbia in 1870.

Q. Were you Surveyor of Washington down to the time that Washington and Georgetown and the county became merged in one jurisdiction?

A. With the exception of an interregnum of four years, I have been connected with the Surveyor's Office of the City of Washington since 1851. I have been continuously employed as Surveyor for the General Government and the City of Washington since 1851."

On page 936 of the Record, the same witness testifies as follows:

"Q. Have you, at the request of solicitors for the Chesapeake and Ohio Canal and solicitors for complainant, prepared a plat of the river front from 17th to 27th streets, west, in this city, showing the lines of the Chesapeake and Ohio Canal Company, and the property of that Company acquired by condemnation and deed?

A. Yes, sir.

Q. Have you also prepared and platted upon that map the outlines of the Kidwell meadows?

A. Yes, sir.

Q. What plan of the city have you used in preparing this map prepared by you?

A. I have used the plan of the City of Washington prepared by Nicholas King, surveyor of the city in 1803, and which is on file in the office of the Chief Engineers of the United States Army, as the successor of the original commissioners of the City of Washington.

Q. Are you familiar with the history of that map?

A. I cannot say that I am, especially as to details. I can only say that it is the best in point of execution of the early maps of the city, and that it has been acted upon ever since it has been prepared, in connection with the affairs of the Surveyor's office, and that the lines of wharfing indicated upon that map from Rock Creek to Easby's Point have been followed; in other words, that all the improvements, such as reclamation of land and the wharves that have been built in that section of the city, were made and built in accordance with the plan of wharfing, &c., indicated on this map. There is in my office a great deal of the work done by Mr. King during his connection with the surveying department of the city, consisting of maps of graduation, books of graduation, &c. *This map of 1803 has always in my recollection, going back forty years, in connection with the affairs of the surveying depart-*

ment of the city, been considered and acted upon as an official map, and from conversations with those who preceded me in the Surveyor's office of the city of Washington I know that it has always been considered by them as an authentic official map of the city. It has, in fact, been the standard map."

On page 938 of Record, at top of page.

"And the same is herewith filed in evidence, and marked Exhibit G. P. No. 11."

"For this exhibit, see printed appendix, page 129."

At bottom of page 941 and top of page 942 of Record, the same witness testifies on cross-examination as follows:

"X-q. What effect, if any, did the construction of the Chesapeake and Ohio canal have on the original channel?

A. Whatever channel previously existed there, must have been greatly affected by the filling, in the construction of the canal. The map 'Exhibit No. 1,' to the answer of the Chesapeake and Ohio Canal Company, and the Boschke maps, show that the bank of the canal next to the river was made by filling in the waters of the river, for almost the whole of the distance from 20th street to 17th street west. The bank was used as the towpath, and to make it, required the deposit of a great deal of filling."

The testimony quoted shows conclusively that the Chesapeake and Ohio Canal Company has been in actual occupation of the *ripa* of the Potomac river from Twenty-sixth street eastward to its terminus in the Tyber basin at Seventeenth street. This fact is not disputed by any party in the case, and is supported by the testimony as well of the United States as of all the defendants claiming between these points.

APPENDIX B.

ACT OF THE STATE OF VIRGINIA.

AN ACT INCORPORATING THE CHESAPEAKE AND OHIO CANAL COMPANY.

[PASSED JANUARY 27, 1824.]

Whereas a navigable canal from the tide water of the river Potomac, in the District of Columbia, to the mouth of Savage Creek, on the north branch of said river, and extending thence, across the Alleghany mountain, to some convenient point of the navigable waters of the river Ohio, or some one of its tributary streams, to be fed through its course, on the east side of the mountain, by the river Potomac and the streams which empty therein, and on the western side of the mountain, and in passing over the same, by all such streams of water as may be beneficially drawn thereto by feeders, dams, or any other practicable mode, will be a work of great profit and advantage to the people of this State, and of the neighboring States, and may ultimately tend to establish a connected navigation between the eastern and western waters, so as to extend and multiply the means and facilities of internal commerce and personal intercourse between the two great sections of the United States, and to interweave more closely all the mutual interests and affections that are calculated to consolidate and perpetuate the vital principles of Union: and whereas it is represented to this General Assembly, that the Potomac Company are willing and desirous that a charter shall be granted to a new company, upon the terms and conditions hereinafter

expressed: and that the charter of the present company shall cease and determine:

Be it therefore enacted by the General Assembly of Virginia, That, so soon as the Legislatures of Maryland and Pennsylvania, and the Congress of the United States, shall assent to the provisions of this act, and the Potomac Company shall have signified their assent to the same by their corporate act, a copy whereof shall be delivered to the Executives of the several States aforesaid, and to the Secretary of the Treasury of the United States, there shall be appointed by the said Executives and the President of the United States, three commissioners on the part of each State, and the Government of the United States, any one of whom shall be competent to act for his respective Government. The said commissioners shall cause books to be opened at such times and places as they shall think fit, in their respective States, and the District of Columbia, under the management of such persons as they shall appoint, for receiving subscriptions to the capital stock of the company hereinafter incorporated; which subscriptions may be made either in person or by power of attorney; and notice shall be given in such manner as may be deemed advisable, by one or more of the said commissioners, of the time and places of opening the books.

2. And the said commissioners shall cause the books to be kept open at least forty days. And, within twenty days after the expiration thereof, shall call a general meeting of the subscribers at the city of Washington, of which meeting notice shall be given, by a majority of the commissioners aforesaid, in at least four of the newspapers printed in Pennsylvania, Maryland, Virginia, and the District of Columbia, at least twenty days next before the said meeting; and such meeting shall and may be continued from day to day until the business is finished; and the commissioners, at the time and place aforesaid, shall lay before such of the sub-

scribers as shall meet according to the said notice, the book containing the state of the said subscriptions; and if one-fourth of the capital sum of six millions of dollars should appear not to have been subscribed, then the said commissioners, or a majority of them, at the said meeting, are empowered to take and receive subscriptions to make up such deficiency, and may continue to take and receive such subscriptions for the term of twelve months thereafter; and a just and true list of all the subscribers, with the sum subscribed by each, shall be made out, and returned by the said commissioners, or by a majority of them, under their hands, to the Board of Public Works of this State, to the Governor and Council of the State of Maryland, to the Secretary of State of the State of Pennsylvania, and to the Secretary of the Treasury of the United States, to be carefully preserved; and in case more than six millions of dollars shall be subscribed, then the sum subscribed shall be reduced to that amount, by the said commissioners, or a majority of them, by beginning at and striking off a share from the largest subscription or subscriptions, and continuing to strike off a share from all subscriptions under the largest, and above one share, until the same is reduced to the capital aforesaid, or until a share is taken from all subscriptions above one share; and lots shall be drawn between subscribers of equal sums, to determine the number of shares which each subscriber shall be allowed to hold, on a list to be made for striking off as aforesaid; and if the sum subscribed still exceed the capital aforesaid, then to strike off, by the same rule, until the sum subscribed is reduced to the capital aforesaid, or all the subscriptions reduced to one share respectively; and, if there still be an excess, then lots shall be drawn to determine the subscribers who are to be excluded, in order to reduce the subscription to the capital aforesaid: which striking off shall be certified on the lists aforesaid; and the said capital stock of the company hereby

incorporated, shall consist of six millions of dollars, divided into sixty thousand shares, of one hundred dollars each: of which every person subscribing may take and subscribe for one or more whole shares; and such subscriptions may be paid and discharged either in the legal currency of the United States, or in the certificates of stock of the present Potomac Company, at the par or nominal value thereof, or in the claims of the creditors of the said Company, certified by the acting President and Directors to have been due, for principal and debt, on the day on which the assent of the said Company shall have been signified by their corporate act, as hereinbefore required: *Provided*, That the said certificates of stock shall not exceed, in the whole amount, the sum of three hundred and eleven thousand one hundred and eleven dollars and eleven cents; nor the said claims the sum of one hundred and seventy-f ve thousand eight hundred dollars; *Provided, also*, That the stock o paid for in certificates of the stock of the present Company, and of the debts due from the said Company, shall be entitled to dividend, only as hereinafter provided; and that no payment shall be received, in such certificate of stock, until the Potomac Company shall have executed the conveyance prescribed by the thirteenth section of this act: *And provided*, That, unless one-fourth of the said capital shall be subscribed, as aforesaid, all subscriptions made in consequence of this act shall be void; and, in case one-fourth, and less than the whole capital, shall be subscribed as aforesaid, then the said commissioners, or a majority of them, are hereby empowered and directed to take and receive the subscriptions, which shall first be offered in whole shares, as aforesaid, until the deficiency shall be made up; a certificate of which additional subscription shall be made, under the hands of said commissioners, or a majority of them, for the time being, and returned as aforesaid.

3. *And be it further enacted*, That, whenever one-fourth, or a greater part of the said stock shall have been subscribed, in the manner aforesaid, then the subscribers, their heirs and assigns, shall be, and are hereby declared to be, incorporated into a company, by the name of the "Chesapeake and Ohio Canal Company," and may sue, and be sued, and, as such, shall have perpetual succession, and a common seal; and the estates, rights, and interests, of the said Company, shall be adjudged and taken in law to be real estate; and it shall, thereupon, be the duty of the said commissioners, or a majority of them, to call a general meeting of the said subscribers, at such time and place, as they, or a majority of them, shall appoint, after advertising the same in such public prints as they, or a majority of them, may think proper; and such of the said subscribers as shall be present at the said meeting, or a majority of them, are hereby empowered and required to elect a President and six Directors, for conducting the said undertaking, and managing all the said Company's business and concerns, for and during such time, not exceeding three years, as the said subscribers, or a majority of them, shall think fit; and, in counting the votes of all general meetings of the said Company, each member shall be allowed one vote for every share, as far as ten shares, and one vote for every five shares above ten, by him or her held at the time, in the stock of the said Company; and any proprietor, by writing under his or her hand, executed before two witnesses, may depute any other member or proprietor to vote and act as proxy for him or her, at any general meeting: *Provided, also*, That no officer or director of said Company shall, under any circumstances, be allowed to vote on any stock but his own.

4. *And be it further enacted*, That the said president and directors, and their successors, or a majority of them, assembled, shall have full power and authority to appoint, and, at their pleasure, dismiss, such engineer or engineers, and agent or agents, as they

may deem expedient, and to fix their compensation; and to agree with any person or persons, on behalf of the said Company, to cut canals, erect dams, open feeders, construct locks, and perform such other works, as they shall judge necessary or expedient for completing the canal hereinbefore mentioned and described; and, out of the money arising from the subscriptions and tolls, and other aids, hereinafter given, to pay for the same, and to repair and keep in order the said canals, locks, and other works necessary thereto, and to defray all incidental charges; and also to appoint a treasurer, clerk, and other officers, toll-gatherers, managers, and servants, as they shall judge requisite, and to agree for, and settle their respective wages or allowances; and to settle, pass, and sign their accounts; and also to make and establish rules of proceeding, and to transact all other business and concerns of the said Company, in and during the intervals between the general meetings of the same; and they shall be allowed, as a compensation for their trouble therein, such sum of money as shall, by a general meeting of the stockholders, be determined: *Provided, always*, That the treasurer shall give bond, in such penalty, and with such security, as the said president and directors, or a majority of them, shall direct, for the true and faithful discharge of the trust reposed in him; and that the allowance to be made him for his services shall not exceed three dollars in the hundred for the disbursements by him made; and that no officer in the Company shall have any vote in the settlement or passing of his own account.

5. *And be it further enacted*, That, on all subscriptions which shall not be paid, as hereinbefore provided, in the certificates of the stock, or debts of the present Potomac Company, there shall be paid, at the time of subscription, on each share, one dollar; and thereafter, when the company shall be formed, the stock subscribed shall be paid on such instalments, and at such times, as the president and directors shall, from time to time, require, as the

work advances: *Provided*, That not more than one-third part shall be demanded within any year from the commencement of the work; nor any payment demanded, until at least sixty days' public notice thereof shall have been given, in such public newspapers as the said president and directors shall direct such notices to be published in: and, whenever any subscriber shall fail to pay any instalment, called for by the company, it shall and may be lawful for the company, upon motion to be made in any court of record, after ten days' notice, to obtain judgment against the subscriber so failing to pay; or the said company, at their option, may, after giving sixty days' notice, in such public newspaper, printed within the District of Columbia, as they may judge proper, sell the stock of such subscriber; and, if the proceeds of any such sale shall exceed the sum demanded, the surplus, after paying the expenses of such sale, shall be paid to the subscriber so failing, or to his legal representatives; and the purchaser, at such sale, shall become a stockholder, and be subject to the same rules and regulations, and entitled to the same privileges, rights, and emoluments, as original subscribers under this act.

6. And to continue the succession of the said president and directors, and keep up the same number: *Be it enacted*, That, from time to time, upon the expiration of the said term for which the said president and directors were appointed, the stockholders of the said company, at the next general meeting, shall either continue the said president and directors, or any of them, or choose others in their stead; and, until such choice be made, the president and directors for the time being shall continue in office; and in case of the death, removal, resignation, or incapacity, of the president, or any of the said directors, may and shall, in manner aforesaid, elect any other person or persons to be president and directors, in the room of him or them so dying, removing, or resigning; and may, at any of their general meetings, remove the president or any of

the directors, and appoint others for and during the remainder of the term for which such person or persons were at first to have acted.

7. *And be it enacted*, That every president and director, before he acts as such, shall take an oath or affirmation for the due execution of his office.

8. *And be it enacted*, That the presence of stockholders, having a major part of the stock at least, shall be necessary to constitute a general meeting of the stockholders, which shall be held on the first Monday in June in every year, at such convenient town or place as shall be, from time to time, appointed by the said general meeting; but, if a sufficient number shall not attend on that day, the stockholders who do attend may adjourn, from time to time, until the stockholders holding the major part of the stock do attend, and the business of the company is finished; to which meeting the president and directors shall make report, and render distinct accounts of all their proceedings; and, on finding them fairly and justly stated, the stockholders then present, or a majority of them, shall give a certificate thereof, a duplicate of which shall be entered on the company's books; and at such yearly general meetings, after leaving in the hands of the treasurer such sums as the stockholders, or a majority of them, shall judge necessary for repairs and contingent charges, an equal dividend of all the nett profits arising from the tolls hereby granted, shall be ordered and made to and among all the stockholders of the said company, in proportion to their several shares, subject to the provisions and enactments hereinafter declared; and, upon any emergency in the interval between the said yearly meetings, the said president, or a majority of the said directors, may appoint a general meeting of the stockholders of the company, at any convenient town or place, giving at least one month's previous notice, in at least four of the newspapers in Pennsylvania, Maryland, Virginia, and the District of Columbia; which meeting may be adjourned and continued as aforesaid; and

in case the stockholders, or a majority of them, in any general meeting aforesaid, shall deem it expedient to order a semi-annual, rather than a yearly dividend, as aforesaid, then, in like manner, with like notice, and under like restrictions, there shall be a half-yearly, or semi-annual dividend of nett profits declared and paid.

9. *And be it enacted*, That, for and in consideration of the expenses the said stockholders will be at, not only in cutting the said canal, erecting locks and dams, providing aqueducts, feeders, and other works, and in improving and keeping the same in repair, the said canal and all other works aforesaid, or required to improve the navigation thereof, at any time hereafter, with all their profits, subject to the limitations herein provided, and to none other, shall be, and the same are hereby, vested in the said stockholders, their heirs and assigns, forever, as tenants in common, in proportion to their respective shares, and be forever exempt from the payment of any tax, imposition, or assessment, whatsoever; and that it shall and may be lawful for the said president and directors, at all times, forever hereafter, to demand and receive, at such places as shall hereafter be appointed by the president and directors aforesaid, tolls for the passage of vessels, boats, rafts, produce, and all other articles, at such rates as the said president and directors may hereafter allow and establish, according to the provisions of this act.

10. *And be it enacted*, That, if the Commissioners hereby required to be appointed shall die, resign, or refuse to act, the vacancy occasioned thereby shall be filled by the same authority by which the original appointment was made; and the person or persons appointed to fill such vacancy shall have all the power and authority which was vested in the commissioner whose place he or they shall be appointed to supply; and, when any part of the canal aforesaid shall have been completed, according to the true intent and meaning of this act, the president and directors of the company hereby created shall have power, and it shall be their duty, to ordain and

establish a rate of tolls to be paid upon boats, vessels, rafts, or other property, passing on the part of the canal so completed, and so, from time to time, as part or parts shall be completed, and until the eastern section thereof shall be finished up to the mouth of Savage river or creek, and, thereafter, until the entire canal shall have been finished according to the true intent and meaning of this act. For the collection of which tolls, the president and directors shall have power to establish so many toll houses, and, at their pleasure, to appoint and remove so many collectors, and at such places, as, from time to time, they may judge expedient; and the said president and directors shall have full authority, subject to the direction and control of a majority in interest of the stockholders represented in any general meeting, to regulate and fix a tariff of tolls, not exceeding an average of two cents per ton per mile; and so to adjust the said tolls, in relation to the capacity or burthen of the boats, and the dimensions of the rafts passing the locks of the said canal, as to promote economy of water and time in the navigation thereof.

11. *And be it enacted*, That the president and directors shall, annually or semi-annually, declare and make such dividend of the nett profits, from the tolls to be received, according to the provisions of this act, and from the other resources of the company, as they may deem advisable, after deducting therefrom the necessary current, and the probable contingent expenses, to be divided among the proprietors of the stock of the said company, in proportion to their respective shares, in manner following, that is to say: if such nett profits shall not exceed ten per cent. on the amount of shares, which shall have been paid for in current money of the United States, and expended on the eastern section of the said canal, then the whole thereof shall be divided among the holders of such shares, in proportion to their respective shares; but, if such nett profits shall exceed the rate of ten per cent. per annum in any year, on such

amount of stock, then the surplus shall be divided among such stockholders as shall have paid for their shares in certificates of the debts of the Potomac Company, until they shall therefrom have received a dividend of six per cent.: and if a surplus yet remain, the same shall be divided among the stockholders who shall have paid for their shares in certificates of the stock of the Potomac Company, until they shall have received therefrom a dividend of six per cent. per annum on such shares: and if a surplus still remain, so long as the western section of the canal shall remain unfinished, such surplus shall be applied, from time to time, to the construction and completion thereof, in such mode as the president and directors, under such rules and regulations, not inconsistent with the Constitution of the United States, or of the several States aforesaid, as the stockholders, or a majority thereof, in general meeting, may prescribe, until the western section of the canal shall be also completed; after which, if such surplus shall still arise, the same shall be divided among all the stockholders, without discrimination, in proportion to their respective shares, until the annual dividend thereon shall have reached fifteen per cent.; beyond which it shall never extend. But, should the nett revenue of the company exceed that amount for any two years in succession, then such excess shall be applied by the president and directors, in such mode as shall be agreed on by a majority of the stockholders convened in general meeting: first, to strengthening and improving the works of the canal of every description requiring the same; next, to the accommodation, where not already provided, of the inhabitants of the shores of the river Potomac, and of the country drained by the tributary streams thereof, now navigable, or which may hereafter become so, by affording to them, in the best practicable mode, a safe and easy access to the canal, from the surface of the main river, and of the said streams emptying therein; and, last of all, to the erection of such walls, of stone or

other materials, along the water margin of the canal, as shall fit the same for the navigation of steam boats of a size adapted to the said canal. And should the said tolls continue, after all such improvements have been completed, to nett more than fifteen per cent. per annum to the stockholders, for any two years in succession, the tolls upon the same shall be reduced, by the president and directors, according to some just and equitable ratio, till the said dividend shall fall to fifteen per cent. per annum: *Provided*, That, should the said dividend thereafter sink below fifteen per cent. the said tolls, or a part thereof, may be renewed, till the said nett dividend reaches that amount. And for any, or all the within mentioned purposes, the said president and directors are empowered to borrow, in behalf of the company, on the credit of such excess of tolls, such sum or sums of money as they may deem expedient, at such rate of interest, and with such delay of payment, as they may stipulate, with the previous consent of a majority of the stockholders in general meeting convened.

12. *And be it further enacted*, That it shall be the duty of the President and Directors of the Chesapeake and Ohio Canal Company, so long as there shall be and remain any creditor of the Potomac Company, who shall not have vested his demand against the same in the stock of the Chesapeake and Ohio Canal Company, to pay to such creditor or creditors, annually, such dividend, or proportion of the nett amount of the revenues of the Potomac Company, on an average of the last five years preceding the organization of the said proposed company, as the demand of the said creditor or creditors at this time, may bear to the whole debt of one hundred and seventy-five thousand eight hundred dollars.

13. *And be it further enacted*, That, whenever the Potomac Company shall have declared its assent to the provisions of this act, in the manner hereinbefore provided, it shall be lawful for the said company to surrender its charter, and convey, in due form of

law, to the Chesapeake and Ohio Canal Company, hereby incorporated, all the property, rights, and privileges, by them owned, possessed, and enjoyed, under the same; and thereupon it shall be lawful to and for the said company, hereby proposed to be created, to accept such surrender and transfer, and to hold, possess, use, and occupy, all the said property, rights, and privileges, in the same manner, and to the same effect, as the said Potomac Company now hold, possess, and occupy the same by law; and thereupon the charter of the said Potomac Company shall be, and the same is hereby, vacated and annulled, and all the rights and powers thereby granted to the Potomac Company, shall be vested in the company hereby incorporated; and it shall be the duty of the said last mentioned company, until every section of the contemplated canal shall be completed, so as to be used and enjoyed for the purposes of navigation, to keep the corresponding part of the river in a proper state for navigation, and in good order as the same now is; and, in default thereof, they shall be in all things responsible, in the same manner as the Potomac Company is now responsible. And in all rivulets, streams, creeks, and rivers, required for the western section of the said Chesapeake and Ohio Canal, the same rights shall be, and are hereby, vested in the Chesapeake and Ohio Canal Company, by this act, as the charter of the Potomac Company vested in the said company, in relation to the waters of the Potomac, and the tributary streams thereof.

14. *And be it enacted*, That the said canal, and the works to be erected thereon in virtue of this act, when completed, shall forever thereafter be esteemed and taken to be navigable as a public highway, free for the transportation of all goods, commodities, and produce, whatever, on payment of the tolls to be imposed, as provided by this act: and no other toll or tax whatever, for the use of the said canal and the works thereon erected, shall, at any time

hereafter, be imposed, but by consent of the said States, and of the United States.

15. And whereas it is necessary for the making of the said canal, locks, dams, ponds, feeders, and other works, that a provision should be made for condemning a quantity of land for the purpose: *Be it enacted*, That it shall and may be lawful for the said president and directors, or a majority of them, to agree with the owners of any land, through which the said canal is intended to pass, for the purchase or use and occupation thereof; and, in case of disagreement, or in case the owner thereof shall be a femme covert, under age, non compos, or out of the State or county, on application to a justice of the county in which such land shall be, the said justice of the peace shall issue his warrant, under his hand, to the sheriff of the county, to summon a jury of eighteen inhabitants of his county, not related to the parties, nor in any manner interested, to meet on the land to be valued, at a day to be expressed in the warrant, not less than ten, nor more than twenty days thereafter; and the sheriff, upon receiving the said warrant, shall forthwith summon the said jury, and, when met, shall administer an oath or affirmation to every juryman who shall appear, being not less than twelve in number, that he will faithfully, justly, and impartially value the land, and all damages the owner thereof shall sustain by cutting the canal through such land, or the partial or temporary appropriation, use, or occupation, of such land, according to the best of his skill and judgment; and that, in such valuation, he will not spare any person for favor or affection, nor any person grieve for malice, hatred, or ill-will; and, in every such valuation and assessment of damages, the jury shall be, and they are hereby, instructed to consider, in determining and fixing the amount thereof, the actual benefit which will accrue to the owner, from conducting the said canal through, or erecting any of the said works upon, his land, and to regulate their verdict thereby; except

that no assessment shall require any such owner to pay or contribute any thing to the said company, where such benefit shall exceed, in the estimate of the jury, the value and damages ascertained as aforesaid; and the inquisition thereupon taken shall be signed by the sheriff and some twelve or more of the jury, and returned by the sheriff to the clerk or prothonotary of his county; and, unless good cause be shown against the said inquisition, it shall be affirmed by the court, and recorded; but, if the said inquisition should be set aside, or if, from any cause, no inquisition shall be returned to such court within a reasonable time, the said court may, at its discretion, as often as may be necessary, direct another inquisition to be taken, in the manner above prescribed: and, upon every such valuation, the jury is hereby directed to describe and ascertain the bounds of the land by them valued, and the quality and duration of the interest and estate in the same, required by the said company for its use; and their valuation shall be conclusive on all persons, and shall be paid for by the said president and directors, to the owner of the land, or his legal representatives; and, on payment thereof, the said company shall be seized of such land as of an absolute estate in perpetuity, or with such less quantity and duration of interest or estate in the same, or subject to such partial or temporary appropriation, use, or occupation, as shall be required and described, as aforesaid, as if conveyed by the owner to them. And whenever, in the construction of the said canal, or any of the works thereof, locks, dams, ponds, feeders, tunnels, aqueducts, culverts, bridges, or works of any other description whatsoever, appurtenant thereto, it shall be necessary to use earth, timber, stone, or gravel, or any other material to be found on any of the lands adjacent, or near thereto, and the said president and directors, or their agent, cannot procure the same for the works aforesaid, by private contract of the proprietor or owner, or in case the owner should be a femme covert, or non compos, or

under age, or out of the State or county, the same proceedings, in all respects, shall be had as in the case before mentioned of the assessment and condemnation of the lands required for the said canal, or the works appurtenant thereto.

16. *And be it enacted*, That it shall be the duty of the company hereby incorporated, to cut, make, and construct the said canal, with good and sufficient locks, on the most improved plan for expedition in the use thereof, and with a width of not less than forty feet at the surface of the water therein, or of twenty-eight feet at the bottom thereof, unless the quality of the soil shall require a narrow base to admit of a sufficient slope to preserve the banks from sliding down, and sufficient to admit, at all seasons, the navigation of boats and rafts, with a depth of four feet water at the least; and wherever wastes shall be essential to the security of the said canal, and in no other situation whatever, along the same, the waste water of the said canal may be, from time to time, sold or disposed of by the said company, for the purpose of supplying such works and machinery as require a water power. And along one side at least of the said canal, and such aqueducts as it may render necessary, there shall be provided throughout its whole extent, a towing path of sufficient breadth to apply the power of horses to the navigation thereof.

17. *And be it enacted*, That it shall and may be lawful for any of the said stockholders to transfer his or her shares, by deed, executed before two witnesses, and registered, after the proof of the execution thereof, in the company's books, and not otherwise, except by devise, which devise shall also be exhibited to the president and directors, and registered in the company's books before the devisee or devisees shall be entitled to draw any part of the profits from the said tolls or dividends: *Provided*, That no transfer shall be made, except for one or more whole share or shares, and not for part of such share or shares; and that no share or

shares shall, at any time, be sold, conveyed, or held in trust for the use and benefit, or in the name of another, whereby the said president and directors, or the stockholders of the said company, or any of them, shall or may be challenged, or made to answer concerning any such trust; but that every person appearing as aforesaid to be a stockholder, shall, as to the others of the said company, be, to every intent, taken absolutely as such; but as between any trustee and the person for whose benefit any trust shall be created, the common remedy may be pursued.

18. *And be it enacted*, That, if the said capital, and the other aids already granted by this act, shall prove insufficient, it shall and may be lawful for the said company, from time to time, to increase the said capital by the addition of so many whole shares as shall be judged necessary by the said stockholders, or a majority of them, present at any general meeting of the said company; and the said president and directors, or a majority of them, are hereby empowered and required, after giving at least two months' previous notice thereof, in at least four of the newspapers printed in Virginia, Pennsylvania, Maryland, and the District of Columbia, to open books in the before-mentioned States and District, for receiving and entering such additional subscriptions, in which the stockholders of the said company for the time being, shall, and are hereby declared to have the preference of all others, for the first thirty days after the said books shall be opened as aforesaid, of taking and subscribing for so many whole shares, as any of them shall choose; and the said president and directors are hereby required to observe, in all other respects, the same rules therein, as are by this act prescribed for receiving and adjusting the first subscriptions, and in like manner to return, under the hands of any three or more of them, an exact list of such additional subscriptions, with the sums subscribed, to the public authorities, as aforesaid, to be, by them, preserved as aforesaid; and all stockholders

of such additional shares, shall, and are hereby declared to be, from thenceforward, incorporated into the said company.

19. *And be it enacted*, That, whenever it shall become necessary to subject the lands of any individual to the purposes provided for in this act, and their consent cannot be obtained, it shall and may be lawful for the company to enter upon such lands, and proceed to the execution of such works, as may be requisite; and that the pendency of any proceedings in any suit in the nature of a writ of ad quod damnum, or any other proceedings, shall not hinder or delay the progress of the work; and it shall be the duty of every court to give precedence to controversies which may arise between the company created by this act, and the proprietors of land sought to be condemned for public uses, and to determine them in preference to all other causes.

20. *And be it enacted*, That the said canal shall be, and the same is hereby divided into two sections, to be denominated first and second, or eastern and western, respectively; that the first, or eastern section, shall begin at the District of Columbia, on tide water, and terminate at or near the bank of Savage river, or creek, which empties into the north branch of the Potomac, at the base of the Alleghany mountain; that the second, or western section, shall commence at the said termination, and extend along the valley of Savage river, or creek, so far as the same, or any branch thereof as may reach some convenient point thereon, for connecting the eastern and western waters, by a tunnel through, or an open cut across the dividing ridge between the same; and thence, after crossing the said dividing ridge, shall proceed to the highest steamboat navigation of the Ohio river, or of some one tributary stream thereof, in such direction as, in the opinion of the said president and directors, shall be best calculated for the attainment of the end set forth in the preamble of this act: that the said president and directors shall first construct the eastern section aforesaid, out of

the capital stock hereinbefore mentioned, and shall next proceed to construct, with all possible dispatch, the western section thereof. In case the said company shall not begin the said work within two years after the company shall have been formed, or if the work, having been so begun, shall not be diligently prosecuted, so that one hundred miles of the said canal, with the adequate locks and incidental improvements, shall not be completed, and in fit order for navigation, in the term of five years from the commencement of the work, then all interest of the said company in the navigation and tolls shall cease and determine, and their charter shall be thereafter taken to be null and void; and so, in like manner, shall the said charter be null and void, if the entire eastern section be not completed in the term of twelve years from the said commencement. And should the said company fail to begin the western section of the said canal in two years after the time allowed as aforesaid for the completion of the eastern section; or, having begun the western section, shall fail to complete the same in six years after such beginning, then all right, title, and interest, of the said company, in the said western section, shall cease and determine; and the several States aforesaid shall have full authority to incorporate another company for the completion of such section, or to complete the same in any other mode that they may deem expedient. And if, after the completion of the said canal and locks, the president and directors shall fail to keep the same in repair for twelve months at any time, then, in like manner, the interest of the company in the navigation and tolls shall cease, and their charter shall be forfeited.

21. *And be it further enacted*, That the right to the waters of the river Potomac, for the purpose of any lateral canal or canals, which the State of Virginia or Maryland may authorize to be made in connexion with the said canal, is reserved to the said States respectively: that a similar right is reserved to the State of

Pennsylvania, in relation to the rivers and streams within the territory of that State, the waters of which may be used in supplying the western section of the said canal; that the Government of the United States shall retain the power to extend the said canal in or through the District of Columbia, on either or both sides of the river Potomac; *Provided*, That, before this act shall take effect, the Congress of the United States shall authorize the States of Virginia and Maryland, or either of them, to take and continue a canal from any point of the above named canal, or the termination thereof, through the territory of the District of Columbia, or any part thereof, to the territory of the said States, or either of them, in any direction they may deem proper, upon the same terms and conditions, and with all the rights, privileges, and powers, of every kind whatsoever, that the company incorporated by this act have to make the Chesapeake and Ohio canal: *And provided*, also, That, in taking or extending such lateral canal or canals through the District of Columbia, by either of the said States, no impediment or injury be done to the navigation of the said Chesapeake and Ohio canal.

22. This act, or so much thereof as respects the Canal and works designed to be constructed in the District of Columbia, and the States of Virginia and Maryland, shall take effect, with such necessary modification in the construction thereof, as shall fit it for such limited application or use, upon the assent of the Congress of the United States, and the Legislature of Maryland being given thereto; and upon its receiving the further assent of the Legislature of Pennsylvania, the whole and every section and part thereof shall be valid and in full force and operation.

23. *Be it further enacted*, That the assent of the Congress of the United States, required by the first section of this act, and the authority conferred by the fourteenth section, is understood and

taken to relate only to their authority as the Legislature of the District of Columbia.

24. *Be it further enacted*, That all acts, and parts of acts, coming within the purview of this act, shall be, and the same are hereby, repealed.

RICHMOND, *December* 30, 1824.

The foregoing is a true copy of an Act of the General Assembly of Virginia.

WM. MUNFORD, *Keeper of the Rolls.*